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No. _____

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

MICHAEL R. MILKEN, LOWELL J. MILKEN, and PAMELA R. MONZERT,

*Petitioners*,

—v.—

SECURITIES AND EXCHANGE COMMISSION,

*Respondent*.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## QUESTIONS PRESENTED

I. In determining whether a judge's "impartiality might reasonably be questioned" by the public under 28 U.S.C. § 455(a), may a court refuse to assess an appearance of partiality from the "viewpoint of the reasonable person," and instead adopt the "purely legalistic perspective" of a sophisticated observer well-versed in financial and legal niceties?

II. Can a disqualifying appearance of judicial partiality be counterbalanced by admittedly unsubstantiated allegations that counsel have been over-zealous in the case or have somehow acted "adversely" to the judge's family interests?

III. Should the standard for mandamus review of a district court's denial of a recusal motion be far more exacting at the outset of litigation, when the disqualifying factors are discovered and the prospect of a tainted trial can be avoided, than the standard applied on direct appeal from a final judgment after trial, when the public's confidence in the judiciary may already have been damaged?

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SECURITIES AND EXCHANGE COMMISSION,

*Respondent*.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners request this Court to issue a writ of certiorari to review a split decision of the United States Court of Appeals for the Second Circuit refusing to disqualify a trial judge whose wife received $30 million in a transaction financed by a defendant.

## OPINIONS BELOW

The opinion of the Second Circuit denying mandamus and Judge Lumbard's dissent, reported at 861 F.2d 1307, 1317, are reprinted as Appendix A. The majority and minority opinions of the Second Circuit judges denying rehearing *en banc*, not yet reported, are reprinted as Appendix B. The unreported opinion

of the District Court for the Southern District of New York (Pollack, J.) denying recusal is reprinted as Appendix C.[1]

## JURISDICTION

The decision of the Court of Appeals was entered on November 15, 1988. The petition for rehearing and suggestion for rehearing *en banc* was denied, over the dissent of four judges (Newman, Kearse, Pratt, Altimari), three months later on February 21, 1989. On March 7, 1989, the Second Circuit stayed issuance of its mandate pending disposition of this petition. (A51).[2] The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## STATUTE INVOLVED

The principal statutory provision herein is 28 U.S.C. § 455(a), which provides as follows:

> Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

Title 28, section 455 of the United States Code is fully set forth as Appendix I.

## STATEMENT OF THE CASE

In June 1988, Judge Pollack's wife and members of her family entered into a leveraged buyout transaction ("LBO") to sell their family business, Palais Royal, Inc. ("Palais Royal"), to Bain Venture Capital ("Bain"). (A6). The LBO was condi-

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1 The proceeding below is captioned *Securities and Exchange Commission v. Drexel Burnham Lambert Incorporated, The Drexel Burnham Lambert Group Incorporated, Michael R. Milken, Lowell J. Milken, Cary J. Maultasch, Pamela R. Monzert, Victor Posner, Steven N. Posner, and Pennsylvania Engineering Corporation*, No. 88 Civ. 6209 (MP) (S.D.N.Y.).

2 Citations to the separately paginated appendices will be styled "A_____."

tioned upon Bain's ability to obtain substantial financing; Bain was investing almost none of its own money. (A6). Bain sought out Drexel, a leading company in financing LBO's, to obtain the necessary high-yield financing. (A24). Drexel underwrote approximately $277 million in high-yield debt financing—the bulk of the purchase price. Drexel put up approximately $186.5 million of its own capital as a bridge loan because only $90.5 million of the debt had been placed at the time of the closing. (A41). Drexel also acquired an 8.5% interest in Mrs. Pollack's family business. (A41).

As a result of Drexel's efforts, Mrs. Pollack received $30 million; other members of her family received $55 million.

On September 7, 1988—at a time when Drexel was already committed to the Palais Royal LBO—the SEC filed an action against Drexel, petitioners (who are all Drexel employees) and others, in the Southern District of New York. (A8). Two days later, defense counsel first discovered that Judge Pollack's wife had a stake in the Drexel-financed LBO. (A8). Defense counsel immediately notified Judge Pollack and the SEC. (A9).

Judge Pollack, who said the news "hit [him] like a ton of bricks," nevertheless felt that the suggestion that he recuse himself was a personal insult and an attack on his professional integrity. (A74, A76). He reacted angrily, calling the notion of a conflict of interest a "cockamamie story," challenging imaginary "improprieties" by counsel, and threatening to impose sanctions on counsel if they moved for recusal. (A75, A76, A79). Insisting that the record be sealed, Judge Pollack declared:

> "I can tell you right now you can forget the issue of recusal and that is one that I would write a very strong opinion about under the circumstances." (A81).
>
> * * *
>
> "I have taken the case and I don't intend to give it up except for some impropriety on my part which I do not visualize exists in this matter." (A82).
>
> * * *

> "If you fellows had put that in an affidavit and come up on a Rule 11, you would have gotten whacked." (A79).
>
> * * *
>
> "I intend to exercise whatever rights I have to sanction anybody who on the basis of insufficient information and failure to investigate and concealment of anything that might or should have been said." (A81).

In short, at the very outset, before all the facts were even known, Judge Pollack prejudged the recusal issue and sought to intimidate counsel into not making the motion. Even after the recusal motion was made under seal on September 20, 1988, Judge Pollack continued to enter sweeping orders in this case regarding case management and discovery—until his activities were stayed, *sua sponte*, by the Second Circuit. (A52-53).

On October 17, Judge Pollack issued an opinion denying the recusal motion, which he labelled "ludicrous," "far-fetched," "bizarre" and an "illusory diversion." (A47, A49, A50). Because Judge Pollack's wife was to receive a $30 million check from Bain, and not directly from Drexel, Judge Pollack reasoned that "[h]ers is not a Drexel-financed transaction." (A46). Judge Pollack concluded that his wife was not in "privity" with Drexel and thus there was "no reasonable basis for doubting the Court's impartiality." (A46-47).

Judge Pollack not only denied the recusal motion; he also launched an attack on the personal integrity of the lawyers who made the motion. On October 10 (Columbus Day), Judge Pollack, acting *sua sponte*, issued an order to show cause accusing one law firm, Paul, Weiss, Rifkind, Wharton & Garrison ("Paul, Weiss"), of having a "conflicting" representation with respect to his wife's family business and of acting "*adversely*" to his family's interests in seeking his removal from the case. (A54-55).

Judge Pollack based his accusations of conflict on the fact that Paul, Weiss had previously rendered tax advice to two Palais Royal shareholders who were members of Judge Pollack's family—well before Bain had approached Drexel to

finance the transaction. In support of his accusations, Judge Pollack assembled a series of "documents from his family's files," (A26) (Lumbard, J., dissenting), that he had collected extrajudicially and marshalled as "evidence" on behalf of what he perceived to be his family's financial interests. (A56-69).

Based on this "evidence," Judge Pollack ordered that two Paul, Weiss partners show cause the following morning why the recusal motion should not be "withdraw[n]." (A55). When the attorneys appeared in open court to show cause, Judge Pollack permitted no argument, summarily referring the matter to the Chief Judge of the Southern District of New York for "disciplinary resolution, if required." (A71). The Judge thus made himself a complaining party against counsel for one of the principal defendants on an issue unrelated to counsel's conduct in the lawsuit before him.

This extraordinary state of affairs has attracted widespread public interest and press coverage and sharply polarized the members of the Second Circuit. On November 15, 1988, a panel of the Second Circuit issued a 2-1 decision denying the mandamus petition. Judge Cardamone (joined by Judge Pierce) held that a writ of mandamus disqualifying Judge Pollack could issue only if "Judge Pollack can 'indisputably' be said to have abused his discretion in denying the motion to recuse himself." (A11-12). Explaining its standard for judicial disqualification, the panel majority wrote:

> We disagree with our dissenting colleague's statement that recusal based on an appearance of impropriety under § 455(a) 'requires us to judge the situation from the viewpoint of the reasonable person, and not from a purely legalistic perspective.'

(A14).

Applying its "purely legalistic" test, the panel majority found dispositive the absence of technical "privity" between Mrs. Pollack and Drexel, emphasizing that Drexel was retained by Bain, not by Mrs. Pollack's company; that Drexel was not "indispensable" to the transaction; that Mrs. Pollack "has had

no business or other dealings with Drexel''; and that Mrs. Pollack ''will receive no money from Drexel.'' (A17). Glossing over the undisputed fact that Mrs. Pollack was to receive a $30 million check drawn on funds Drexel raised specifically to finance Mrs. Pollack's transaction, the panel majority concluded that this ''connection is too remote to mandate recusal.'' (A17). The majority apparently believed that the public's perception of partiality would be influenced by whether Drexel's $30 million check was drawn to the order of Mrs. Pollack or drawn to the order of Bain and then endorsed to Mrs. Pollack. Finally, the majority ruled that in determining whether a judge's ''impartiality might reasonably be questioned,'' a court must weigh admittedly unsubstantiated charges that a party intentionally created a conflict and that defense counsel engaged in judge shopping—because ''a reasonable observer would want to know.'' (A20).

Judge Lumbard, in a vigorous dissent, disagreed with the majority's stringent standard of mandamus review, explaining that appellate review of a judge's failure to recuse himself must not be confined to ''abuse of discretion''; rather, the appellate court ''must query whether the trial judge could exercise that discretion in the face of a 'personal, extrajudicial bias which precludes dispassionate judgment.' '' (A32). Moreover, Judge Lumbard declared that ''to impute a lack of privity is to exalt the form of the transaction over its substance, and to ignore the reasonableness standard of § 455(a), which requires us to judge the situation from the viewpoint of the reasonable person, and not from a purely legalistic perspective.'' (A27-28). Judge Lumbard reasoned that the lack of technical privity ''can fool no one'' regarding the ''inescapable relevant fact'' that ''Mrs. Pollack will not get $30 million but for Drexel.'' (A23, A27). He added: ''It is largely because of Drexel's efforts that Mrs. Pollack will receive $30 million. That is the common sense of it; and it is the public perception that Mrs. Pollack is to be paid $30 million thanks to Drexel.'' (A28).

Moreover, according to Judge Lumbard, Judge Pollack ''cannot act impartially in these cases'' because of his intemperate reaction to the recusal motion, which Judge Pollack stated

was "adverse" to his family's interests—"as if his continued participation in this litigation would be favorable to those family interests." (A27). Judge Lumbard concluded that "we must act to avoid compounding the harm already done to the public's perception of the integrity of the judiciary." (A32).

On February 21, 1989, after three months of deliberations, the Second Circuit denied the petition for rehearing and suggestion for rehearing *en banc*, although four judges (Newman, Kearse, Pratt, Altimari) took the unusual step of issuing an opinion dissenting from the denial of rehearing *en banc*. Judge Newman, writing for the dissenters, declared that "[t]hese are extraordinary circumstances, raising profound questions as to the standards for recusal and the role of this Court in maintaining the highest standards of judicial propriety in [the Second] Circuit." (A42). Judge Newman, not impressed by the privity theory, believed that rehearing was essential given the "flow of substantial sums of money from Drexel, the litigant before the District Judge, to the Judge's wife." (A41).

Judge Newman also concluded that mandamus was required because Judge Pollack's attacks against defense counsel "place[d] the Judge in the role of adversary, on behalf of his wife, to counsel now appearing in the litigation before the Judge." (A41). Judge Newman explained that "the present situation involves the District Judge, not solely as a presiding judicial officer, but as the husband of a principal victim of the attorneys' alleged ethical violation." (A42).

In these circumstances, Judge Newman concluded that the effect of the majority's decision to deny mandamus relief not on the merits, but under a concededly daunting standard of review, is to place this "important litigation" under "a cloud." (A42).

Four other Second Circuit judges (Meskill, Pierce, Cardamone and Miner), brushing aside the appearance of judicial partiality, concurred in the court's denial of rehearing but found that Judge Pollack's attacks on counsel came "perilously close" to the borderline for recusal. (A36). Those judges, like the panel majority, relied on the technical "privity" theory and

concluded that the " 'flow of substantial sums' to Mrs. Pollack" were "much too indirect and circuitous a movement to lead reasonable, objective and impartial observers" to be concerned about an appearance of partiality. (A39).

Recent developments, which occurred during the three months the Second Circuit was debating rehearing and which were noted by Judge Newman (A43), make the appearance of partiality in this case—and the threat to the public's confidence in the integrity of the federal judiciary—even more startling. Drexel has agreed in principle with the United States Attorney for the Southern District of New York to plead guilty to certain criminal charges and to fire petitioner Michael Milken, and is now engaged in negotiations with the SEC to settle the SEC's lawsuit against Drexel pending before Judge Pollack.

If Drexel settles and cooperates in governmental investigations of petitioners—who will remain defendants in the SEC civil action—Drexel, which raised $30 million for the wife of the presiding trial court judge, will be in a position potentially adverse to petitioners. But whether Drexel settles or not, it is difficult to imagine a more glaring case where a judge's "impartiality might reasonably be questioned" by members of the public.

## REASONS FOR GRANTING THE WRIT

The combined impact of the Second Circuit's erroneous legal theories—its contempt for the perceptions of average members of the public, its weighing of extraneous factors to offset an appearance of partiality, and its illogical standard of mandamus review that discourages the resolution of recusal motions at the outset of litigation—undermines public confidence in the judiciary. This Court should review these unprecedented and mischievous theories, which erode the important congressional policies animating section 455(a) and clash with this Court's opinion in *Liljeberg* and the decisions of several other Circuits.

## I.

## THE SECOND CIRCUIT'S DECISION GUTS SECTION 455(a) AND CONFLICTS WITH *LILJEBERG* AND DECISIONS OF OTHER CIRCUIT COURTS.

### A. The Second Circuit's Decision Eviscerates Section 455(a).

Section 455(a) provides that a judge "shall disqualify himself in any proceeding in which his impartiality *might* reasonably be questioned" (emphasis added). "The general language of [section 455(a)] was designed to promote public confidence in the integrity of judicial process by replacing the subjective 'in his opinion' standard with an objective test." *Liljeberg* v. *Health Services Acquisition Corp.*, 108 S. Ct. 2194, 2201 n.7, 2202 (1988).[3] While the panel majority pays lip service to the objective recusal standard, the decision actually reflects a return in the direction of the subjective recusal standard that Congress repealed in 1974.

#### (1) The Second Circuit Embraces a "Purely Legalistic Perspective," Not a Common-Sense Approach, in Deciding Section 455(a) Motions.

The majority, as Judge Lumbard points out, expressly rejects the need to consider the perspective of the average "person in the street," and instead focuses on the perceptions of a supersophisticated person who is presumed to know and understand all financial and legal nuances—including the hoary doctrine of contractual privity. Thus, the majority asserts:

> We disagree with our dissenting colleague's statement that recusal based on an appearance of impropriety under § 455(a) 'requires us to judge the situation from the view-

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3 *Cf. Commonwealth Coatings Corp.* v. *Continental Casualty Co.*, 393 U.S. 145 (1968) (invalidating an arbitration award by applying a strict appearance-of-partiality standard).

> point of the reasonable person, and not from a purely legalistic perspective.'

(A14).

Judge Lumbard, in contrast, takes a common-sense approach in harmony with the goal of section 455(a)—"to promote public confidence in the integrity of the judicial process." *Liljeberg*, 108 S. Ct. at 2202. He observes that legalistic arguments based on privity "exalt the form of the transaction over its substance" and "can fool no one regarding who is responsible for raising the money and causing it to get to Mrs. Pollack." (A27). To Judge Lumbard, the "inescapable relevant fact" is that "Mrs. Pollack will not get $30 million but for Drexel." (A23, A27). Judge Lumbard concludes, "[i]t is clear to me that a reasonable person knowing these ultimate conceded facts would reasonably question Judge Pollack's ability to supervise such litigation impartially." (A23).

Judged from the viewpoint of either the scholar or the average "person in the street," recusal is clearly warranted here. But beyond the particular facts of this case, the Second Circuit's decision leads to pernicious consequences that are antithetical to the congressional objective in enacting section 455(a). By eschewing the perspective of the average person applying common sense in favor of a sophisticated observer supposedly guided but actually distracted by legal technicalities about privity, the majority opinion all but eliminates the public "appearance" portion of the "appearance of impartiality" standard, leaving a technical and legalistic standard that fails to promote public confidence in the integrity of the federal courts. The issue here is not privity, but the appearance of partiality.

**(2) The Second Circuit's Decision Relies on Extraneous Factors Hostile to the Purposes of Section 455(a).**

Under section 455(a), the *only* issue is whether a judge's "impartiality *might* reasonably be questioned." Nevertheless,

the majority ruled that in making such an inquiry it is also appropriate to consider other issues—such as allegations of attorney misconduct, improper charges of forum shopping, rank speculation that a party deliberately created the conflict, and a district judge's purported investment of time in a litigation. (A18-20). Remarkably, the panel majority concedes that the SEC's allegations of judge-shopping and suggestion that Drexel intentionally created the grounds for recusal "are not established facts upon which decision may rest" (A18, A20), but nevertheless concludes that "a reasonable observer would want to know" about these unsupported charges. (A20).[4] In his opinion concurring in the denial of *en banc* review, Judge Pierce (joined by Judges Meskill, Cardamone and Miner) again stresses the need to weigh against the appearance of judicial partiality unproven allegations of judge-shopping and the deliberate creation of a conflict. (A35).

Under the majority's startling theory, charges of overzealousness by defense counsel must somehow be balanced against the appearance of judicial bias, with courts left to guess whom the public would blame more. That makes no sense. A public perception of partiality cannot be undone by innuendoes of attorney misconduct. One issue has nothing to do with the other. Converting disqualification motions into contests in which a tribunal weighs the court's partiality against counsel's alleged misbehavior—an illogical exercise at best—will surely diminish an already skeptical public's respect for the integrity of the judicial system.

**(3) The Panel Majority Opinion Undermines This Court's Holding in *Liljeberg*.**

The majority's repudiation of the average "person-in-the-street" standard, and its invention of a "good guy, bad guy"

4 Judge Lumbard correctly points out in dissent that "[t]here is absolutely no evidence that Drexel agreed to act for Bain in order to manufacture a situation in which Judge Pollack's continued participation in ongoing litigation could be challenged." (A23). The majority does not dispute this; indeed, it concedes that such charges are unsubstantiated. (A18, A20, A35).

balancing act, are completely at odds with this Court's landmark decision in *Liljeberg*.

The facts of *Liljeberg* are, briefly, as follows:

The trial judge was a trustee of Loyola University. Loyola had contracted to sell real estate to Liljeberg, who had obtained a "certificate of need" from Louisiana to construct a hospital on the site. This was a favorable transaction for Loyola. A lawsuit arose when a third party ("HSAC") claimed it was entitled to Liljeberg's certificate. The trial judge, sitting without a jury, ruled in favor of Liljeberg. The Fifth Circuit affirmed.

Ten months later, after learning that the trial judge was a Loyola trustee, HSAC moved to vacate the judgment on the ground that the judge was disqualified under section 455(a). This Court accepted the Fifth Circuit's conclusion that, during the trial, the judge had forgotten about Loyola's interest in the litigation, although he had previously been informed of this fact. Nonetheless, this Court, quoting the Fifth Circuit, declared that " '[i]f it would appear to a reasonable person that a judge has knowledge of facts that would give him an interest in the litigation[,] then an appearance of partiality is created *even though no actual partiality exists*. . . .' " *Id.* at 2202 (emphasis added).

If *Liljeberg* presented what this Court described a "plain" case for recusal, *id.* at 2203, then the facts here spell out an even plainer case. After all, the trial judge in *Liljeberg*, who forgot about Loyola's interest in the lawsuit, did not stand to gain a penny from the transaction—he was merely a trustee of a university that stood to profit. Here, Judge Pollack is well aware of the $30 million payment to his wife due to Drexel's efforts. (A29). In *Liljeberg*, the disqualifying facts were raised *after* a final judgment and an appellate affirmance. In contrast, Judge Pollack became aware of his wife's multi-million dollar stake in the Drexel-financed LBO within two days after the SEC filed its complaint.

More important, the rationale of the Second Circuit panel undermines the teaching of *Liljeberg* and sets a dangerous precedent that conflicts with decisions of other Circuits. If this Court had focused on extraneous factors such as judicial efficiency, or applied the Second Circuit's "purely legalistic perspective," it would have reached the opposite result in *Liljeberg*. There, this Court vacated a final judgment—years after the Circuit Court had affirmed the judgment—even though there had been an enormous investment of judicial resources; here, petitioners move for recusal at the outset of litigation. In *Liljeberg*, this Court found an appearance of partiality because the public "might" reasonably have concluded—*contrary to fact*—that the trial judge knew about the Loyola conflict when he rendered his decision. But the Second Circuit's reasoning here "assumes" that the hypothetical observer "knows and understands all the relevant facts" (A13)—including the fact that the *Liljeberg* trial judge had forgotten about his interest in the litigation. Thus, the Second Circuit's savant blinded by legal technicalities—unlike this Court's "reasonable" person in the street—would have concluded that there was no appearance of partiality in *Liljeberg*.

In short, the standard for judicial disqualification under the statute—and under *Liljeberg*—looks only to *public appearances*. The Second Circuit simply ignores this basic point.

### B. The Second Circuit Decision Conflicts With the Decisions of Other Circuit Courts.

The Fifth and Eleventh Circuits have recently issued recusal decisions, applying section 455(a) and *Liljeberg*, that directly conflict with the Second Circuit opinion here.

In *In re Faulkner*, 856 F.2d 716 (5th Cir. 1988), the Fifth Circuit held that despite "the total absence of any showing of actual bias," *id.* at 721, the trial judge was disqualified under section 455(a). The Fifth Circuit—in direct conflict with the Second Circuit—declared that *Liljeberg* "reiterated that the

view of the *average*, reasonable person is the standard for analysis as to whether a judge shall disqualify himself or herself." *Id.* at 720 (emphasis added). The Fifth Circuit added:

> Significantly, the [*Liljeberg*] Court suggests that *although the view of the 'reasonable person' may not always be fair or even accurate, it is still the standard that must be applied*: '[P]eople who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges. The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible.' [*Liljeberg*] at 2204-05.

*Id.* at 721 (emphasis added). Similarly, in *Parker* v. *Connors Steel Co.*, 855 F.2d 1510 (11th Cir. 1988), the Eleventh Circuit relied on *Liljeberg* in holding that section 455(a) "embodies an objective standard" and focuses on the "*disinterested lay observer.*" *Id.* (emphasis added).

Few things are more important than preserving the foundations of public confidence in the basic institutions of government. This case, which has proceeded under the spotlight of the press, the financial community, and the public at large, provides the ideal vehicle for this Court to assure the public that the federal courts maintain the strictest standards of judicial integrity, and to resolve a conflict in the Circuits concerning the application of section 455(a).

## II.

## THE SECOND CIRCUIT'S DECISION CREATES AN ILLOGICAL STANDARD FOR MANDAMUS REVIEW OF DISTRICT COURT DENIALS OF RECUSAL MOTIONS THAT CONFLICTS WITH DECISIONS OF OTHER CIRCUITS.

### A. The Second Circuit's Standard of Mandamus Review Creates an Illogical Rule of Law and Trivializes *Liljeberg*.

The majority bases its opinion on an incorrect and unworkable standard for mandamus review of recusal motions, which undermines the purposes of section 455(a) and conflicts with decisions in other Circuits and the rationale of *Liljeberg*.

The majority confines mandamus review of a denial of a recusal motion to those instances where an "extraordinary showing" can be made that "the district court indisputably abused its discretion." (A11, A15). The majority opinion concedes that its daunting standard of mandamus review for recusal motions is far higher than the standard on plenary appeal after trial and judgment. (A15). Judge Pierce's concurring opinion denying rehearing likewise emphasizes that the standard of review varies depending on the "procedural" point at which recusal is requested: "the applicable standard of review [on a direct appeal] would no longer require Drexel to show that it had a 'clear and indisputable' right to relief, the standard which is applicable to petitions for writs of mandamus. . . ." (A37).

Judge Lumbard, in his dissent, rejects the panel majority's view, stating that the standard of review of a judge's refusal to recuse himself is *not* an "abuse of discretion" standard. "Rather, we must query whether the trial judge could exercise that discretion in the face of a 'personal, extrajudicial bias which precludes dispassionate judgment.' " (A32) (quoting *In re IBM*, 618 F.2d 923, 926 (2d Cir. 1980)).

Judge Lumbard's standard of review makes good sense. Three appellate court judges removed from the "rough and

tumble'' of district court proceedings are in a far better position than the trial judge to gauge the likely public perception of the district judge's impartiality. In addition, certain judges, like the district judge here, may regard a recusal motion as some sort of professional insult and thus may be unable to evaluate the merits of the motion in an entirely objective and dispassionate manner. In such cases, as here, appellate court deference to a district court's denial of a recusal motion is particularly inappropriate.

The Second Circuit's standard of mandamus review, moreover, is at odds with the rationale of this Court's decision in *Liljeberg*. The panel majority attempts to take *Liljeberg*'s stringent standard for judicial disqualification out of play by theorizing that it ''is inapposite by reason of its procedural circumstances.'' (A15). The majority states:

> In *Liljeberg*, the Court of Appeals was not faced with, as here, a petition for a writ of mandamus, but rather was presented with an ordinary appeal. . . . This clearly differentiates the standard of review applied in *Liljeberg* from that used in reviewing Judge Pollack's denial of Drexel's recusal motion.

(A15). But the very point of section 455(a), reaffirmed by this Court in *Liljeberg*, is that the systemic imperative of maintaining public confidence in the judicial process demands that the rigorous standards governing judicial integrity under section 455(a) be scrupulously honored and not depend on fortuitous procedural circumstances—such as when a party discovers facts warranting a judge's disqualification. Breaches of judicial ethics should not be papered over at the beginning of a litigation only to be confronted at the end.

Furthermore, the majority's single-minded focus on the ''extraordinary'' nature of mandamus relief utterly obscures the even more ''extraordinary'' procedural circumstances that confronted this Court in *Liljeberg*. As noted above, the disqualifying facts in *Liljeberg* were first raised ten months *after* a final judgment had been affirmed by the Court of Appeals. This Court nevertheless concluded that the interest in maintaining

"the public's confidence in the judicial process" is of such transcendent significance as to constitute an "extraordinary circumstance" sufficient to overcome the policy in favor of the finality of judgments embodied in Fed. R. Civ. P. 60(b)(6). 108 S. Ct. at 2204.

For the following additional reasons, the standard of mandamus review adopted by the Second Circuit is illogical, inefficient, and will further undermine public confidence in the judiciary.

*First*, the panel majority's lopsided procedural framework discourages the prompt resolution of disqualification issues at the threshold of litigation and encourages parties to defer review until after entry of final judgment, at which time they will know the result on the merits and can decide whether they wish to upset it. This incentive to sandbag recusal motions frustrates this Court's command in *Liljeberg* that litigants must "promptly disclose" those facts that might necessitate a judge's recusal. 108 S. Ct. at 2206.[5]

*Second*, applying an artificially stringent standard of review for recusal motions in mandamus proceedings will result in the unnecessary expenditure of considerable judicial and private resources in connection with a trial that will be a nullity if overturned on appeal under a normal standard of review.

*Third*, the majority's stringent mandamus standard creates a perverse incentive for a judge who narrowly escaped mandamus to later rule on the merits for the party who could make the most forceful recusal argument on appeal. A trial judge, in an effort to avert accusations of favoritism, might, as Judge New-

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5 *See also Satterfield* v. *Edenton-Chowan Bd. of Ed.*, 530 F.2d 567, 574-75 (4th Cir. 1975) (holding that the grounds warranting recusal must be disclosed promptly); *Health Services Acquisition Corp.* v. *Liljeberg*, 796 F.2d 796, 802 (5th Cir. 1986) (same), *aff'd*, 108 S. Ct. 2194 (1988); *In re City of Detroit*, 828 F.2d 1160, 1167-68 (6th Cir. 1987) (same); *United States* v. *Patrick*, 542 F.2d 381, 390 (7th Cir. 1976) (same), *cert. denied*, 430 U.S. 931 (1977); *Phillips* v. *Amoco Oil Co.*, 799 F.2d 1464, 1472 (11th Cir. 1986) (same), *cert. denied*, 481 U.S. 1016 (1987).

man suggested, "bend over backward to rule against the litigant [he was soon to be accused of favoring] on close questions in order to demonstrate impartiality." (A43). The public, as a result, would be led to view recusal proceedings not as a vital mechanism designed to promote public confidence in an impartial judiciary, but merely as a tactic in a perpetual game of deceptive propriety played by everyone—including judges.

*Fourth*, as Judge Newman observed, where, as here, a district judge denies a recusal motion and the court of appeals denies mandamus not on the merits but because of a very strict standard of review, the litigation continues under "a cloud." (A42). That cloud, moreover, will never fully dissipate. The institutional taint created by a district judge's refusal to step aside in the face of a substantial recusal motion, absent immediate consideration on the merits by the appellate court, is indelible and cannot be erased from the public mind even by a subsequent appellate affirmance. Any judgment rendered in these circumstances can be dismissed by one side or the other as the result of either judicial partiality or an undue desire to avoid the appearance of judicial partiality.

*Fifth*, a post-judgment ruling that a trial before a tainted judge should never have occurred in the first place independently erodes public confidence in the judicial process. As Justice (then Judge) Scalia pointed out in dissent in *Richardson* v. *United States*, 702 F.2d 1079, 1086 (D.C. Cir. 1983), *rev'd*, 468 U.S. 317 (1984), public confidence in the judicial process is harmed not only from the fact of a trial that never should have been held in the first place, but also from the public spectacle of vacating the result of such a trial for reasons unrelated to the merits.

### B. The Second Circuit's Standard of Mandamus Review Conflicts With The Standard Applied by Other Circuits.

The daunting standard of mandamus review adopted by the Second Circuit (an "extraordinary showing" of an "indisputable abuse of discretion") is in direct conflict with the far more reasonable standard (mere "error") applied by the Courts of

Appeals for the Fourth, Fifth, and Seventh Circuits. This Court has never addressed the standard governing mandamus review of a district court's denial of a recusal motion.

As Judge Posner explained for the Seventh Circuit Court of Appeals in *Union Carbide Corp.* v. *United States Cutting Service, Inc.*, 782 F.2d 710, 712-13 (7th Cir. 1986):

> A judge's refusal to recuse himself in the face of a substantial challenge casts a shadow not only over the individual litigation but over the integrity of the federal judicial process as a whole. The shadow should be dispelled at the earliest possible opportunity by an authoritative judgment either upholding or rejecting the challenge.
>
> * * *
>
> [W]here a serious [recusal] question is raised, we shall interpret generously our power to issue the writ [of mandamus], in order that we may lay the question to rest at the earliest possible time.

*See also United States* v. *Balistrieri*, 779 F.2d 1191, 1204-05 (7th Cir. 1985).

Likewise, the Fourth and Fifth Circuits have applied a less stringent standard of mandamus review of district court denials of recusal motions, and thus are in direct conflict with the Second Circuit. *See In re Rodgers*, 537 F.2d 1196, 1197 (4th Cir. 1976) (granting mandamus where the district judge "erred" when he declined to recuse himself from presiding over a criminal trial);[6] *In re Faulkner*, 856 F.2d 716, 720 (5th Cir. 1988) (granting mandamus where the district court "erroneously" failed to recuse himself).

The important public policy considerations underlying recusal motions demand that standards of review facilitate prompt

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6 *See also In re Va. Elec. & Power Co.*, 539 F.2d 357, 365 (4th Cir. 1976) ("In recent years, however, federal courts, with the Supreme Court's approval, have come to appreciate the usefulness and flexibility of mandamus in other, less extreme, situations. In particular, mandamus has emerged as an appropriate remedy in the supervision of district courts by the various courts of appeals."); *cf. LaBuy* v. *Howes Leather Co.*, 352 U.S. 249 (1957).

resolution, and that the standard of review *not* be more onerous at the outset of a litigation than after trial. The standard of review should not vary among the Circuits, for that in itself erodes the public's confidence in the integrity of the Nation's judiciary. Certiorari is necessary so this Court, which has never addressed this issue, can establish uniform standards to govern mandamus review of a district court's denial of a recusal motion and resolve the present conflict among the Circuits.

## CONCLUSION

As Judge Lumbard wrote:

> A central pillar of our government is the people's confidence that our courts are free of bias or favor and are administered by judges who are unquestionably impartial. Whenever any reasonable basis to doubt a judge's impartiality exists, this public trust demands that we act swiftly and decisively.

(A32).

For the reasons stated above, a writ of certiorari should be granted.

Dated: April 5, 1989

Respectfully submitted,

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**APPENDIX A**

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 578—August Term 1988

(Argued October 31, 1988 Decided November 15, 1988)

Docket No. 88-3060

IN RE: DREXEL BURNHAM LAMBERT INCORPORATED, DREXEL BURNHAM LAMBERT GROUP INCORPORATED, MICHAEL R. MILKEN, LOWELL J. MILKEN, CARY J. MAULTASCH, and PAMELA R. MONZERT,

*Petitioners.*

IN RE: IVAN F. BOESKY SECURITIES LITIGATION,

SECURITIES AND EXCHANGE COMMISSION,

*Plaintiff,*

—v.—

DREXEL BURNHAM LAMBERT INCORPORATED, DREXEL BURNHAM LAMBERT GROUP INCORPORATED, MICHAEL R. MILKEN, LOWELL J. MILKEN, CARY J. MAULTASCH, and PAMELA MONZERT,

*Defendants.*

Before:

LUMBARD, CARDAMONE and PIERCE,
*Circuit Judges*

A petition for a writ of mandamus has been filed by Drexel Burnham Lambert Incorporated, *et al.* seeking the recusal under 28 U.S.C. § 455 of Senior United States District Court Judge Milton Pollack on the grounds that he is disqualified from presiding over pending civil fraud actions, which name petitioners as defendants. The underlying actions against petitioners were instituted by the Securities and Exchange Commission on September 7, 1988, and earlier by individual and class action plaintiffs. Plaintiffs filed opposition papers to the issuance of the writ.

The petition for a writ of mandamus is denied. Judge Lumbard dissents and votes to grant the writ in a separate opinion.

PETER FLEMING, JR., New York, New York (Eliot Lauer, Mark H. O'Donoghue; Curtis, Mallet-Prevost, Colt & Mosle, New York, New York, of counsel), *for Defendants Drexel Burnham Lambert Incorporated and Drexel Burnham Lambert Group, Inc.*

ARTHUR LIMAN, New York, New York (Martin Flumenbaum; Paul, Weiss, Rifkind,

Wharton & Garrison, New York, New York, of counsel), *for Defendant Michael R. Milken.*

PAUL GONSON, Washington, D.C., (Thomas C. Newkirk, Securities and Exchange Commission, Washington, D.C., of counsel), *for Respondent Securities and Exchange Commission.*

GEORGE REYCRAFT, New York, New York (Richard J. Wiener, Pamela Rogers Chepiga, Debra L. Brown; Cadwalader, Wickersham & Taft, New York, New York, of counsel), *for* Arden Way *Plaintiffs.*

DAVID BERGER, Philadelphia, Pennsylvania (Berger & Montague, P.C., Philadelphia, Pennsylvania, of counsel), *for Class Plaintiffs in* In re Boesky Securities Litigation.

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CARDAMONE, *Circuit Judge*

A petition for a writ of mandamus has been presented seeking the disqualification of Senior United States District Court Judge Milton Pollack from presiding over certain civil fraud actions arising from claims of illegal insider trading. One action has been instituted by the plaintiff Securities and Exchange Commission (SEC or Commission) against the present petitioners, defendants Drexel Burnham Lambert Incorporated, Drexel Burnham Group Incorporated, Michael R. Milken, Lowell J. Milken, Cary J. Maultasch, and Pamela R. Monzert

(Drexel). The other action is an amalgam of similar consolidated civil fraud actions instituted by individual plaintiffs that include the Drexel corporations as named defendants. Plaintiffs in both of these pending civil suits have appeared in opposition and have filed responses to Drexel's petition.

It is axiomatic that a judge may not preside over a case when his impartiality might reasonably be questioned. In deciding the sensitive question of whether to recuse a judge, the test of impartiality is what a reasonable person, knowing and understanding all the facts and circumstances, would believe. It is for that reason that we cannot adopt a *per se* rule holding that when someone claims to see smoke, we must find that there is fire. That which is seen is sometimes merely a smokescreen. Judicial inquiry may not therefore be defined by what appears in the press. If such were the case, those litigants fortunate enough to have easy access to the media could make charges against a judge's impartiality that would effectively veto the assignment of judges. Judge-shopping would then become an additional and potent tactical weapon in the skilled practitioner's arsenal. Instead, the sensitive issue of whether a judge should be disqualified requires a careful examination of those relevant facts and circumstances to determine whether the charges reasonably bring into question a judge's impartiality.

## I FACTS

We trace the facts and circumstances chronologically. Nearly two years ago, in December 1986, 11 shareholders' class action suits alleging injury as a result of insider trading were brought against Ivan Boesky and others, including Drexel Burnham agents. These actions were filed in the

Southern District of New York and in the Northern and Central Districts of California. The suits brought in the Southern District of New York were assigned to Judge Pollack. In March of 1987 an additional civil fraud action, in which Drexel was also a named defendant, styled *Arden Way Associates, et al. v. Ivan F. Boesky, et al.*, (*Arden Way*), was begun in the Southern District. The two Drexel corporations were represented in these suits by Cahill Gordon & Reindel (Cahill Gordon) of New York City. As a result of the multiple claims asserted in these related class and individual actions, the Judicial Panel on Multidistrict Litigation, on July 24, 1987, brought together all the pending actions, including *Arden Way*, in the Southern District of New York for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407 (1982). This request to transfer was addressed to Southern District Chief Judge Brieant with a suggestion that all of the class and non-class actions be assigned to Judge Pollack. An order consenting to the transfer was filed on August 5, 1987. The entire group of cases are referred to as "*In re Ivan F. Boesky Securities Litigation*" (*Boesky Litigation*) and charged Drexel, along with other defendants, with acting in concert with Boesky and his affiliated companies to violate the securities and civil anti-racketeering laws of the United States.

For well over a year substantial pretrial activity has occurred in the class and non-class actions. Judge Pollack has issued three published decisions in the multi-district cases—one of which involved Drexel's motion to dismiss the *Arden Way* complaint. He also has issued 36 management orders resolving discovery disputes and establishing discovery schedules. Drexel has, in addition, litigated a number of substantive, procedural, and discovery matters before Judge Pollack.

In June 1988 while the *Boesky Litigation* against Drexel was in full swing, Palais Royal, Inc., a closely held corporation operating a retail chain in Texas entered into negotiations to sell its business in a leveraged buyout (LBO) transaction. The stockholders include Mrs. Moselle Pollack and members of her family. Mrs. Pollack, who is Judge Pollack's wife, is a controlling stockholder. The purchaser is Bain Venture Capital (Bain), which plans to carry-out the transaction through Specialty Holdings, Inc. (SHI), a corporation formed for the purpose of effectuating the acquisition. On June 29, 1988 the stockholders of Palais Royal entered into a contract—called an "Agreement and Plan of Merger"—to sell all of their shares to Bain in exchange for cash. Drexel is not a party to that agreement. The agreement is contingent on Bain's obtaining the necessary financing for the LBO. Bain agreed to use its best efforts to obtain financing on "terms reasonably satisfactory to [Bain]." The financing was Bain's exclusive responsibility, and, at Bain's request, none of the selling stockholders has had any contact with potential lenders. Reliable expert testimony in the form of an affidavit executed by Lewis L. Glucksman, former Chairman and Chief Executive Officer of Lehman Brothers Kuhn Loeb, which the district court credited, stated that the acquisition was not a difficult LBO to finance and that a number of investment banking firms could provide the financing on terms comparable to those offered by Drexel. This opinion was based on the fact that Palais Royal's current management has agreed to continue to operate the company after the consummation of the transaction, and that these same managers have, in recent years, operated the business profitably despite Houston's adverse economic climate. Glucksman concluded that the sale could

be successfully financed with or without Drexel's participation.

When the sale occurs, no member of the now-controlling family will have any interest in Palais Royal. Further, Drexel will have no equity interest in the business. As the deal is now structured, Drexel will have no dealings with Palais Royal or with Mrs. Pollack. Its role is to act as a "best efforts" underwriter or "placement agent" of the debt to be issued by Bain. The dissenting opinion refers frequently to Drexel's role in financing the deal. Yet, even at the time of oral argument before us, Drexel stated that, though it was still exploring the matter and expected to participate, it still had no binding contractual obligation to act for Bain, *i.e.*, to obtain the financing to enable Bain to conclude the transaction. Although Drexel may acquire an option to purchase 15 percent of the new company formed by Bain, it is not obligated to do so, and even if it were to purchase an equity interest in the acquisition vehicle, it would do so only after the Bain/Palais Royal deal had been fully consummated. Thus, Drexel's option to purchase equity securities in the new corporation created by Bain will only arise after Mrs. Pollack is completely disassociated from Palais Royal.

Bernard Fuchs, President and Chief Executive of Palais Royal, stated that, as management's representative (he is not a stockholder), he informed potential lenders with whom he met, including Drexel, that Moselle Pollack is the widow of the company's founder and the wife of Judge Pollack of New York. In addition, in late July or early August, 1988 Bain gave Drexel, as a would-be best efforts underwriter, a copy of the June 29, 1988 agreement, that listed Mrs. Moselle Pollack as a selling stockholder. Drexel's papers reveal that, in July 1988, it

engaged in a substantial "due diligence" inquiry of Palais Royal, focusing on its closely-held ownership and control. In its negotiations with Bain, Drexel was represented by Cahill Gordon, its counsel of record. A Cahill Gordon partner acknowledged having received the June 29th Agreement and Plan of Merger on August 19, 1988.

Earlier, in the spring of 1988, George and Phyllis Asch, stockholders in Palais Royal, met with attorneys at Paul, Weiss, Rifkind, Wharton & Garrison of New York City (Paul Weiss). This law firm represents petitioner Michael R. Milken, a top Drexel official. George Asch claims that, at a meeting in the Paul Weiss law offices on June 2, 1988, the sale of Palais Royal was discussed, particularly with respect to the tax implications for the Aschs as New York resident stockholders. Asch further states that Moselle Pollack's relationship to Judge Pollack and her status as a stockholder in Palais Royal was fully known to Paul Weiss, as reflected in correspondence from a Paul Weiss partner who sent a copy of a letter concerning Palais Royal dated April 6, 1987 to "Mrs. Milton Pollack."

The present proceeding was precipitated on September 7, 1988 when the Securities and Exchange Commission, as plaintiff in the underlying civil enforcement action, filed an 184-page complaint against Drexel and others in the Southern District of New York in an action styled *Securities & Exchange Commission v. Drexel Burnham Lambert Incorporated, et al.*, (*Drexel Litigation*). The complaint, which has nothing to do with Palais Royal, alleges that Drexel and others had devised and carried out fraudulent insider trading schemes, manipulated stocks, and committed other violations of the federal securities laws. Counsel for Drexel maintains that two days later—on September 9—they first became aware that Judge Pollack's wife had

a $30 million interest in the Palais Royal sale. After having been notified of the potential conflict by means of an *ex parte* telephone call placed by Drexel's attorneys on Saturday, September 10, the judge set a hearing in his chambers for September 13, where the situation was explored by the court and by counsel for the SEC and Drexel. The topic of recusal was broached by Drexel's counsel and was rejected by Judge Pollack.

On September 20th a formal motion to recuse was made. At two subsequent hearings—held on September 22 and 27—the district judge did not decide the motion and instead established discovery procedures. Arguments on the recusal motion were scheduled for October 11. Petitioners filed a mandamus application on September 30 in this Court, asking that Judge Pollack be recused in the *Drexel Litigation*, but they did not make the same application with respect to the *Boesky Litigation*. We denied the mandamus application as premature, noting that Judge Pollack had not yet ruled and that a hearing had been scheduled for October 11. Following the hearing, Judge Pollack handed down a written decision in which he denied the motion that he disqualify himself in either the *Drexel Litigation* or the *Boesky Litigation*.

On October 19 the instant mandamus petition was filed. We stayed the district court from conducting any further proceedings, set October 28 as the time for opposition papers to be filed and heard oral argument on the petition for the writ on October 31.

## II DISCUSSION

Petitioners urge that the district court judge be recused in this proceeding on three separate bases: (1) under 28

U.S.C. § 455(a) because his "impartiality might reasonably be questioned" by reason of his wife's substantial interest in the Palais Royal transaction; (2) because his personal attacks on defense counsel's integrity purportedly reflect bias and accentuate the alleged appearance of existing impartiality; and (3) under § 455(b)(4) because his wife has a "financial" or "other interest that could be substantially effected" by the outcome of the proceedings.

The SEC, plaintiff in the *Drexel Litigation*, and the class and individual action plaintiffs in the *Boesky Litigation* oppose the application for the writ. They argue, in substance, that Drexel's role is too remote from Mrs. Pollack's sale of stock to bring into reasonable question the judge's impartiality under § 455(a); that there is no basis to conclude that the outcome of the litigation pending in the district court could affect Mrs. Pollack's interest in the Palais Royal transaction; and that the district judge's comments to counsel were an appropriate response in the circumstances. The *Arden Way* plaintiffs also argue that Drexel's untimely use of § 455 was a part of its litigation strategy to manipulate the judicial process. Before we consider the statute, its legislative history, and its construction by this and other courts, we discuss briefly the scope of our review.

A. *Issuance of a Writ of Mandamus and Scope of Review of District Court's Determination*

An appellate court's power to issue a writ of mandamus upon a claim of wrongful refusal to recuse is inextricably related to the scope of review over the district court's determination. Hence, we discuss these subjects together. Although a court of appeals has authority to "issue all writs . . . agreeable to the usages and principles of law," 28 U.S.C. § 1651(a) (1982), "[t]he remedy of mandamus is

a drastic one, to be invoked only in extraordinary situations." *Kerr v. United States District Court*, 426 U.S. 394, 402 (1976); *see also Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980) (per curiam). Further, it is well-settled that the exceptional remedy of mandamus will only be invoked where the petitioner has demonstrated that its right to such relief is "clear and *indisputable*." *See Moses H. Cohen Memorial Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 18 (1983) (emphasis added); *Allied Chem. Corp.*, 449 U.S. at 35; *In re International Business Machines Corp.*, 618 F.2d 923, 927 (2d Cir. 1980). Were this not so, mandamus applications to review a judge's refusal to recuse would become an effective tactic for harassment and delay.

Discretion is confided in the district judge in the first instance to determine whether to disqualify himself, *see Apple v. Jewish Hospital & Medical Center*, 829 F.2d 326, 333 (2d Cir. 1987). The reasons for this are plain. The judge presiding over a case is in the best position to appreciate the implications of those matters alleged in a recusal motion. In deciding whether to recuse himself, the trial judge must carefully weigh the policy of promoting public confidence in the judiciary against the possibility that those questioning his impartiality might be seeking to avoid the adverse consequences of his presiding over their case. *See In re United States*, 666 F.2d 690, 695 (1st Cir. 1981). Litigants are entitled to an unbiased judge; not to a judge of their choosing.

A judge is as much obliged not to recuse himself when it is not called for as he is obliged to when it is. *See In re Union Leader Corp.*, 292 F.2d 381, 391 (1st Cir.), *cert. denied*, 368 U.S. 927 (1961). Thus, upon reviewing this petition we must determine whether Judge Pollack can

"indisputably" be said to have abused his discretion in denying the motion to recuse himself. *In re United States*, 666 F.2d at 697. As an appellate court, we do not ask outselves whether we would have ruled in the same manner as did the trial court, but rather whether the district judge's decision is a rational one finding support in the record. *See In re United States*, 666 F.2d at 695. Further, in adopting the 1974 amendments to § 455, Congress noted that the revised statute was "not designed to alter the standard of appellate review on disqualification issues." H.R. Rep. No. 1453, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 6351, 6355 (House Report).

Thus, in reviewing the instant petition, we must bear in mind not only the standards governing recusal, but we must also consider the extraordinary showing required to obtain the issuance of a writ of mandamus. In other words, petitioners must "clearly and indisputably" demonstrate that the district court abused its discretion. Absent such a showing, mandamus will not lie.

B. *Statute and Cases*

The pertinent provisions of 28 U.S.C. § 455 provide as follows:

§ 455. Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of dis-

> puted evidentiary facts concerning the proceeding; . . .
>
> (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(1) § *455(a)*

Section 455(a) of the Judicial Code has a legislative history which sheds some light on the issue facing us. One of the purposes of the enactment was to "clarify" the grounds for disqualification. House Report at 6351. The amended section establishes an objective standard "designed to promote public confidence in the impartiality of the judicial process." *Id.* at 6354-55. Although the "duty to sit" concept has been removed—the House Report continues—the new test is not intended to permit judges to avoid controversial or difficult cases. *Id.* at 6355. Most significantly for our purposes, Congress noted that

> The issue of disqualification is a sensitive question of assessing *all the facts and circumstances* in order to determine whether *the failure to disqualify was an abuse of sound judicial discretion.*

*Id.* (emphasis added). Thus, the test to be applied is an objective one which assumes that a reasonable person *knows and understands all the relevant facts. See Pepsico, Inc. v. McMillan*, 764 F.2d 458, 460 (7th Cir. 1985); *United States v. Ferguson*, 550 F. Supp. 1256, 1260

(S.D.N.Y. 1982). We disagree with our dissenting colleague's statement that recusal based on an appearance of impropriety under § 455(a) "requires us to judge the situation from the viewpoint of the reasonable person, and not from a purely legalistic perspective." Like all legal issues, judges determine appearance of impropriety—not by considering what a straw poll of the only partly informed man-in-the-street would show—but by examining the record facts and the law, and then deciding whether a reasonable person knowing and understanding all the relevant facts would recuse the judge.

The Supreme Court in *Liljeberg v. Health Services Acquisition Corp.*, 108 S. Ct. 2194 (1988), emphasized that, in amending § 455(a), Congress aimed to promote public confidence in the judiciary. *Id.* at 2202. In *Liljeberg*, the Court was faced with the question of whether a judge who did not have actual knowledge of his direct fiduciary interest in the matter before him should nonetheless have vacated the judgment he had rendered in the matter after he learned of such interest. In affirming the circuit court's reversal of the denial of the motion to vacate, the Court concluded that, despite the judge's actual lack of knowledge, § 455 imposed a stringent standard requiring a judge to inform himself about his personal and fiduciary financial interests. Thus, as a trustee of a university that had a direct stake in the outcome of the litigation over which he was presiding, the judge had a strong fiduciary interest in the resolution of the controversy which, the Court held, required vacatur of the judgment.

Conversely, where an interest is not direct, but is remote, contingent, or speculative, it is not the kind of interest which reasonably brings into question a judge's

impartiality. *See In re Placid Oil Co.*, 802 F.2d 783, 787 (5th Cir.), *reh'g. denied* 805 F.2d 1030 (1986). *Cf. Mavis v. Commercial Carriers, Inc.*, 408 F. Supp. 55 (C.D. Cal. 1975) (district court cannot be disqualified because of ownership of stock in non-party oil company because a remote subsidiary of a corporation with which the oil company had engaged in joint ventures was a party in a proceeding before it).

In addition, it is essential to note that the procedural posture presented in *Liljeberg* differs significantly from the posture in which we are called upon to review Judge Pollack's denial of the recusal motion. Thus, as is more fully discussed below, *Liljeberg* is not only distinguishable from the instant case by reason of the directness of the link between the judge's fiduciary interests and the resolution of a case over which he was presiding, but more importantly, it is inapposite by reason of its procedural circumstances. In *Liljeberg*, the court of appeals was not faced with, as here, a petition for a writ of mandamus, but rather was presented with an ordinary appeal. In the instant case, we are called upon to invoke an extraordinary remedy which requires a showing that the district court indisputably abused its discretion. This clearly differentiates the standard of review applied in *Liljeberg* from that used in reviewing Judge Pollack's denial of Drexel's recusal motion.

(2) § *455(b)(1)*

Under § 455(b)(1) what a judge learns or comes to believe in his judicial capacity "is a proper basis for judicial observations, and the use of such information is not the kind of matter that results in disqualification." *United States v. Bernstein*, 533 F.2d 775, 785 (2d Cir.), *cert.*

*denied*, 429 U.S. 998 (1976). A determination of bias under this section must be based on extrajudicial conduct, not conduct arising in a trial setting. Decisions or rulings must be adverse to a party, and legal disagreements with counsel are not sufficient for judicial disqualification under § 455(b)(1), or, to state it another way, bias against a lawyer, even if found to exist, without more is not bias against his client. *In re Cooper*, 821 F.2d 833, 841-42 (1st Cir. 1987). *See In re IBM*, 618 F.2d 923, 929 (2d Cir. 1980) (trial judge must be free to make rulings on the merits without the apprehension that if he makes a disproportionate number in favor of one litigant, he may have created the impression of bias).

### (3) § *455(b)(4)*

Further, § 455(b)(4) states that a judge is disqualified if he or a family member has a financial interest in the subject matter of the litigation or is a party thereto. Courts faced with construing subsection (b)(4) have inferred that "any other interest that could be substantially affected" also means an interest in the subject matter of the litigation or a party to it. *See Department of Energy v. Brimmer*, 673 F.2d 1287 (Temp. Emer. Ct. App. 1982); *In Re New Mexico Natural Gas Antitrust Litigation*, 620 F.2d 794 (10th Cir. 1980); *In Re Virginia Electric and Power Co.*, 539 F.2d 357 (4th Cir. 1976).

## III ANALYSIS

We begin analysis of the facts and circumstances under § 455(a) by setting them forth. First, we identify and analyze the charges of partiality and, second, we set forth the assertions made by respondents to the petition.

## A. § *455(a)*

### 1. *Petitioners' Charges*

Petitioners charge that because Mrs. Pollack is obtaining $30 million for the sale of her stock in Palais Royal there has been created an appearance of impropriety that requires Judge Pollack's recusal. The charge is based on the two premises: that Drexel's money will be paid to Mrs. Pollack and that Drexel is indispensable to the transaction. Neither statement is true. Mrs. Pollack has had no business or other dealings with Drexel; she will receive no money from Drexel; and Drexel is not essential to the completion or success of the transaction. Moreover, there is no nexus, direct, indirect or otherwise, between the civil suits pending before Judge Pollack and Mrs. Pollack's interest in Palais Royal.

Instead, the relevant facts are that Drexel has a potential commitment to Bain or SHI, *not* to Palais Royal or to Mrs. Pollack. If Drexel performs its role, the funds will belong to Bain and *not* to Palais Royal; if Drexel fails to perform for Bain or SHI, some other financial institution is likely to because it is a profitable opportunity. As previously noted, Lewis L. Glucksman states in an affidavit that a number of major investment banking firms could handle the placing of Bain's notes on terms comparable to those offered by Drexel. The facts support that conclusion. Palais Royal has operated profitably for 21 consecutive years despite recent regional hardship, and its present management will be retained by Bain.

Consequently, Judge Pollack's connection is too remote to mandate recusal because Drexel has no obligation direct or indirect to Mrs. Pollack. To adopt petitioner's theory would mean that any remote connection even, for exam-

ple, to investors who buy SHI bonds from Drexel would mandate recusal. Thus, the price of avoiding any hint of impropriety, no matter how evanescent, would grant litigants the power to veto the assignment of judges. In our view, petitioners' theory would carry a worthy policy too far.

### 2. *Respondents' Claims*

We next set forth the assertions made by respondents through affidavits claiming lack of timeliness and an attempt by Drexel to manipulate the judicial process through judge-shopping. These assertions are not established facts upon which decision may rest. Yet, they constitute those circumstances that an "objective observer", *see Liljeberg*, 108 S. Ct. at 2203, or a reasonable person knowing all the facts and circumstances should consider in order to decide whether the failure to recuse was an abuse of sound judicial discretion. House Report at 6355.

A paralegal employed by the SEC states that when she attempted to file the underlying civil fraud complaint in the Southern District Clerk's office on September 7, defendant Lowell Milken's counsel who was waiting at the clerk's office—apparently having foreknowledge of her arrival—"tried to prevent [her] from filing the Drexel court papers." The Deputy Chief Litigation Counsel in the Enforcement Division of the SEC, also present at the Clerk's office on September 7, asserts in an affidavit that one of Drexel's attorneys "threatened that if the Commission filed its action as one related to those pending before Judge Pollack", he would seek Rule 11 sanctions against him and the other lawyers responsible for filing the action.

Immediately thereafter counsel representing various Drexel defendants and the SEC went to Judge Pollack's

chambers where Drexel's counsel requested that the judge refrain from accepting the case until they had an opportunity to consult with other counsel. Three days later Drexel's counsel telephoned Judge Pollack at his house on Saturday afternoon September 10, *ex parte*, and without prior notification to SEC's counsel. The purpose of the call was to advise the Judge that Mrs. Pollack was going to get $50 or $60 million from Drexel. At the hearing held on September 13, Drexel's counsel, Thomas F. Curnin of Cahill Gordon, acknowledged that he could not be sure what the agreement provided because he had never seen the June 29th Agreement and Plan of Merger, which prompted his concern and brought about the *ex parte* telephone call to the judge's home. Based on this patently inadequate examination by a member of the same firm that had been representing Drexel in its negotiations with Bain, the judge made a strong Rule 11 comment. No one disputes that until the telephone call, Judge Pollack had no intimation of Drexel's role in assisting Bain finance its stock purchase.

At the September 22 hearing, oral argument on the recusal motion was set for October 11. On September 30, before the SEC had responded, Drexel filed its first mandamus petition before us, which we ruled was premature. At the October 11 hearing only Drexel urged Judge Pollack's disqualification. The plaintiffs in the *Boesky Litigation* argued that because Judge Pollack had been actively presiding over their cases for 18 months, his recusal would seriously prejudice them.

Because Drexel's counsel was before Judge Pollack defending Drexel in the *Boesky Litigation* for over a year, and because the same counsel represented Drexel in its negotiations with Bain—and saw the agreement between

Bain and the selling Palais Royal stockholders—it seems plausible that Drexel knew or should have known in July or August, 1988 that Mrs. Pollack was a stockholder selling to Bain. Further, petitioner Michael Milken's counsel, Paul Weiss, apparently knew even earlier that Mrs. Pollack was a selling stockholder in Palais Royal. Moreover, Drexel's proposal to Bain did not occur until well after Judge Pollack had been assigned to preside in the multidistrict *Boesky Litigation*.

Whether Drexel's involvement in the Palais Royal transaction sprang from an improper motive is not now known. Yet, based on all the recited circumstances, respondents assert that to grant mandamus will establish a dangerous precedent permitting a party, by its own actions, to effect the recusal of a judge already presiding over the litigation. Of course, respondents' assertions are not established as matters of fact. Consequently, our decision does not turn on these assertions. Nonetheless, they are circumstances that a reasonable observer would want to know in deciding whether Judge Pollack's refusal to recuse himself created an appearance of impropriety.

We believe that, in light of the facts and circumstances that are known, a reasonable person would not conclude that the judge's impartiality could reasonably be questioned under § 455(a). Such conclusion is reinforced because of the particular procedural posture in which this case is before us as a petition for a writ of mandamus. Certainly the circumstances just recited make it evident that petitioners have failed to establish the necessary clear and indisputable right to that extraordinary writ.

B. § *455(b)(1)*

Petitioners' counsel claim that Judge Pollack's criticism of their behavior shows that the judge is personally biased and provides additional grounds for his recusal. To the contrary, counsel's misconduct drew what appears to us to be appropriate warnings from the district court. An appellate court, in passing on questions of disqualification of the type here presented, determines the disqualification on the basis of conduct which shows bias or prejudice or lack of impartiality by focusing on a party, not on counsel. The sharpness in colloquy between the judge and counsel, quoted by petitioners, does not demonstrate bias, but is well within the acceptable boundaries of courtroom exchange. *See In re IBM*, 618 F.2d at 931-32. Further, the remarks made by Judge Pollack challenged by petitioners were made in the context of judicial conferences and hearings and were directly addressed to the conduct of the attorneys before him; they did not extend to extrajudicial matters beyond that conduct. We see no reason for disqualification in these exchanges. Finally, petitioners argue that the district court's October 10 order to show cause why the motion to recuse should not be withdrawn and why Paul Weiss should not be investigated for its allegedly conflicting representation with respect to the Palais Royal deal is a demonstration of actual bias that mandates recusal under § 455(b)(1). We cannot agree. Although we do not reach the merits of the show cause order, the trial court's actions do not reflect prejudice or lack of impartiality regarding the parties to the litigation. The substantive issues embodied in the order were directed at counsel's actions and are not therefore cognizable under § 455(b)(1). Should litigation proceed to final judgment or other conclusion, and should bias later be found to have

permeated the case, that situation may be corrected on direct appeal.

### C. § *455(b)(4)*

Finally, petitioners place little emphasis on § 455(b)(4). They contend that Mrs. Pollack's participation in the Palais Royal transaction is an "other interest" that could be "substantially affected" by this proceeding, but do not explain how the outcome of this lawsuit could affect Mrs. Pollack's interest in the Palais Royal transaction, let alone "substantially affect" that interest. In fact, we see no basis to conclude that this litigation could have any effect whatsoever on the Palais Royal transaction. Hence, there is no merit to this claimed ground for disqualification.

## IV CONCLUSION

In sum, we conclude that an objective observer knowing and understanding all the facts and circumstances could not reasonably question Judge Pollack's impartiality. Petitioners have not clearly and indisputably established their right to a writ. Accordingly, for the reasons stated, the petition for a writ of mandamus is denied.

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LUMBARD, *Circuit Judge*, dissenting:

We should grant the writ of mandamus and direct Judge Pollack to recuse himself from consideration of these cases.

Events which no one could have foreseen, and which no one arranged, have created a reasonable doubt of Judge

Pollack's impartiality in supervising these cases. Drexel inadvertently has been brought into a relationship with the financial interests of the wife of the judge who happens to be responsible for deciding litigation of great public importance brought against Drexel and four of its principals by the Securities and Exchange Commission (SEC) and individual plaintiffs. Judge Pollack has refused to recuse himself. The sole question before us is whether, in view of the wide publicity accorded these so-called insider trading cases, Judge Pollack's "impartiality might reasonably be questioned", 28 U.S.C. § 455(a), by a reasonable person knowing the relevant facts.

To me, the inescapable relevant fact is that Drexel has been, and is now, retained by the firm which is under contract with Mrs. Pollack and members of her family to arrange financing for the cash purchase of Palais Royal, their family business, from which members of the family will receive over $84 million and Mrs. Pollack herself, and as trustee, will receive $30 million in cash. It is clear to me that a reasonable person knowing these ultimate conceded facts would reasonably question Judge Pollack's ability to supervise such litigation impartially. Such a reasonable person's next question would be "Why hasn't the judge stepped aside?" Moreover, Judge Pollack's expressed resentment to the suggestion of recusal and his castigation of Drexel and its counsel has confirmed these doubts. He cannot act impartially in these cases.

There is absolutely no evidence that Drexel agreed to act for Bain in order to manufacture a situation in which Judge Pollack's continued participation in ongoing litigation could be challenged. Drexel became involved in the Palais Royal deal in the same manner in which it might become involved in any of its deals. First, the stockholders

of Palais Royal, consisting of Mrs. Pollack and family members, agreed on June 29, 1988 to sell the company to Bain Venture Capital (Bain) for over $84 million, on condition that Bain obtain financing for the purchase. Thereafter, Bain arranged with Drexel to obtain the necessary financing for the purchase of Palais Royal and another business with which Palais Royal is to be merged, in what is known as a leveraged buyout (LBO). It is undisputed that Bain sought out Drexel, a leading company in the successful and profitable managing of LBOs; Drexel did not seek to create a disqualification issue.

Moreover, there is no evidence that Drexel is not committed to this transaction. Although the majority suggests that Drexel may not be contractually obligated to Bain, the evidence before us leads to the opposite conclusion. The majority's attempt to deemphasize the nexus between Palais Royal and the instant litigation by hypothesizing that a court conceivably might find Drexel uncommitted to Bain is to brush aside both the uncontroverted evidence and the reasonableness standard of § 455(a). Drexel already has agreed to supply in excess of $200,000,000; it has completed an extensive "due diligence" investigation. It also has an option to purchase 15% of the acquiring company. Although the June agreement fixes no closing date, the parties expect to close the deal sometime in November 1988.

The record is similarly devoid of any evidence which suggests that Drexel waited until an opportune moment to "discover" the conflict. On September 7, 1988, the SEC filed suit against Drexel and four of its principals seeking injunctive relief and disgorgement of profits. On the SEC's suggestion that this new action was related to other civil suits already supervised by Judge Pollack, it was

assigned to him. Two days later, on September 9, Bain advised Cahill Gordon & Reindel (Cahill Gordon), Drexel's counsel, that the Moselle Pollack who had signed the agreement with Bain and who had a $30 million interest in the Palais Royal buyout was the wife of Judge Pollack. Drexel's attorney informed Judge Pollack by telephone on the very next day of Mrs. Pollack's interest in the deal.

When it became known to counsel for Drexel that the Moselle Pollack who would benefit from the buyout was the wife of Judge Pollack, the judge conducting the cases involving Drexel, it was their duty to bring the matter to the judge's attention without delay. The duty to inform a judge of a potential conflict rests upon whichever party becomes aware of such a situation. Any feelings which either party may have about the judge's favoring one or the other are wholly immaterial. To save embarrassment, time and expense, and the validity of any judgment, counsel have a duty to act promptly.

According to the undisputed evidence in the record before us, the Cahill Gordon attorneys who were representing Drexel in these cases did not know until September 9 that Moselle Pollack was the wife of Judge Pollack. Different attorneys in the firm had been representing Mrs. Pollack in her negotiations for the sale of Palais Royal, and nothing in the record indicates that anyone at Cahill Gordon knew of the link before September 9. If, as the SEC suggests, Drexel was anxious to get Judge Pollack out of these cases, it would seem that someone at Cahill Gordon would have acted as soon as the firm became aware that the judge was Moselle Pollack's husband. In sum, there is no reason to believe that Cahill Gordon could have acted any sooner than it did.

At this point in the proceedings, Judge Pollack's resentment at the idea of recusal became apparent. After conference with counsel in his chambers on September 13, Judge Pollack refused to consider recusal. He called the suggestion a "cockamamie story" and threatened counsel with sanctions for acting on "insufficient information."

On September 20, the petitioners filed a formal motion to recuse, returnable October 4, which Judge Pollack adjourned to October 11th. As the judge continued to rule on pretrial matters in the private civil cases, the petitioners sought a writ of mandamus on September 30. We denied the petition as premature in view of the hearing scheduled for October 11.

Meanwhile, on October 10, the day before he was to hear the recusal motion, Judge Pollack, on his own motion, issued an order directing Paul, Weiss, Rifkind, Wharton & Garrison (Paul, Weiss), which represents Michael R. Milken, a top Drexel official involved in the SEC litigation and the petition for recusal, and two of its partners, Arthur Liman and Martin Flumenbaum, to show cause why "they should not be required to identify and withdraw the papers on said disqualification motion which they have drafted, filed and served herein." With the order, Judge Pollack served copies of documents from his family's files to support his charge that, by joining in the recusal motion on behalf of the individual principals of Drexel, the Paul, Weiss firm was undertaking "conflicting" representation and acting adversely toward the Pollack family members, whom they had represented in other matters. At the October 11 hearing, Judge Pollack refused to hear argument on his order and referred the matter to Chief Judge Brieant "for disciplinary resolution, if required."

It appears from this response to the recusal motion that the judge viewed the suggestion that he recuse himself from the Drexel litigation as adverse to the interests of his family—as if his continued participation in this litigation would be favorable to those family interests.

Judge Pollack's hostility towards the moving parties was repeated in his opinion of October 17. Judge Pollack emphasized the lack of "privity" between Mrs. Pollack and Drexel, writing that Mrs. Pollack's transaction "is not a Drexel-financed transaction." He also made much of the argument that Drexel is not essential to the deal and that Bain could easily retain one of Drexel's competitors to provide the required financing. In finding no reasonable basis for doubting his impartiality, Judge Pollack wrote that the "speculations" in which Drexel's lawyers engaged to "concoct[ ]" perceptions of impropriety seem so "far-fetched" as reactions of a reasonable person as to be "ludicrous".

My colleagues, in denying the petitioners' renewed application for mandamus, also rely upon the lack of "privity" between Mrs. Pollack and Drexel. Their argument rests on the fact that, instead of Drexel paying Mrs. Pollack with its own check for $30 million, Drexel will arrange the payment to a Bain subsidiary created for that purpose, which in turn will pay the $30 million to Mrs. Pollack. This can fool no one regarding who is responsible for raising the money and causing it to get to Mrs. Pollack. According to present plans, Mrs. Pollack will not get $30 million but for Drexel.

In this case, to impute a lack of privity is to exalt the form of the transaction over its substance, and to ignore the reasonableness standard of § 455(a), which requires us to judge the situation from the viewpoint of the reasonable

person, and not from a purely legalistic perspective. Drexel is integrally involved in this transaction and has been so for several months. It is largely because of Drexel's efforts that Mrs. Pollack will receive $30 million. That is the common sense of it; and it most certainly is the public perception that Mrs. Pollack is to be paid $30 million thanks to Drexel.

Of course, there might have been others who would be interested in working on the deal, but that is irrelevant. If Bain could have made other arrangements with a firm as well qualified as Drexel and on equally advantageous terms, it probably would have done so during the weeks when it was working on the deal and before it chose Drexel. In the absence of any showing of artifice on Drexel's part, the question is whether Judge Pollack reasonably appears not to be impartial. It is beside the point to assert that there is no showing that Drexel is indispensable.

The nature and extent of the interest of Mrs. Pollack and her family in the deal from which the family members will receive no less than $84 million is obviously of concern to Judge Pollack. His interest is considerably stronger than was the fiduciary interest of Judge Robert Collins, as a trustee of Loyola University, which the Supreme Court recently considered in *Liljeberg v. Health Services Acquisition Corp.*, 108 S. Ct. 2194 (1988). In *Liljeberg*, Loyola had contracted to sell a tract of its land for about $6.5 million to John Liljeberg, Jr. for the construction of a hospital, subject to a buy-back clause which would be triggered if Liljeberg did not secure a construction contract within one year and Loyola did not receive certain benefits from the anticipated rezoning of Loyola's land adjacent to the hospital. At the same time, Judge Collins was presiding over an action in which a third party, with whom Liljeberg

was contemplating building a hospital on a different site, was challenging Liljeberg's ownership of a state-issued "certificate of need" for a hospital. Had Liljeberg not won ownership of the certificate, which is required for the successful operation of a hospital, it is likely that the buy-back provision would have been triggered and that Loyola would have lost the benefits associated with the hospital's construction.

Unlike Judge Pollack, who has been aware of his conflicting interest since the third day after the SEC filed suit, Judge Collins did not actually know about his fiduciary interest in the litigation until after he had filed his opinion. The Supreme Court nevertheless held that the judge's attendance at meetings of the Board of Trustees at which the prospective sale was discussed raised reasonable doubts about his impartiality and vacated Judge Collins' judgment.

The *Liljeberg* Court squarely held that whenever a question involving disqualification is presented, it is critical promptly to examine all possible bases for the judge's disqualification. *Liljeberg*, *supra*, at 2205. The Court found unconvincing the facts that Loyola was not a party to the suit, that the judge was unaware of the conflict during the pendancy of the case, and that the judge's interest was only as a fiduciary rather than as a personal investor. What persuaded the Supreme Court to vacate the judgment after it was entered was the appearance of impropriety. As the *Liljeberg* Court said: "[P]eople who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges. The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety

whenever possible." 108 S. Ct. at 2204-05 (footnote omitted).

Such an appearance of impropriety is, in fact, usually avoided by our federal judges as a matter of course. Since well before the amendment of § 455 in 1974, it has been the custom of federal judges in the Second Circuit and elsewhere to recuse themselves whenever they or their spouses hold any stock or have any financial interest of any kind, however small, in any company or enterprise which is a party, or is linked with any party, in any matter coming before them. Each year every judge, including every senior judge who still sits, must file a statement of the stock holdings and other investments of the judge and the judge's spouse. That statement also reflects the sales and acquisitions of such interests during the preceding year. The spirit of these practices has been to resolve any doubt in favor of recusal. *See United States v. Murphy*, 768 F.2d 1518, 1536-41 (7th Cir. 1985).

Moreover, the American Bar Association Code of Judicial Conduct requires that a judge recuse himself whenever "he knows that he . . . or his spouse . . . has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by [its] outcome." A.B.A. Code of Judicial Conduct Canon 3C(1)(c). Given the public attention that has been focused on the disclosures regarding insider trading and the public concern for the integrity of the marketplace, there is a heightened awareness of the importance of insuring the absolute impartiality of any judge who participates in the resolution of litigation concerning such activities. If Judge Pollack remains in charge of these cases, Mrs. Pollack's financial interest in Drexel's

successful completion of the deal can only exacerbate these public concerns.

The cases relied upon in opposition to the petition for mandamus are inapposite. In *Mavis v. Commercial Carriers, Inc.*, 408 F. Supp. 55 (C.D. Cal. 1975), Judge Hauk held that recusal was not required where the judge owned some common stock in a subsidiary, twice removed, of a corporation that had done some business with the defendant company. In *Mavis*, the corporation indirectly owning the company in which the judge held stock had done business with the defendant in the past. The Palais Royal buyout, on the other hand, is happening now.

*In re Placid Oil Co.*, 802 F.2d 783 (5th Cir. 1986), held that the judge's ownership of stock in a bank did not mandate his recusal from a case involving unrelated banks. The argument in support of his recusal, that the outcome of the litigation might affect the banking industry generally, was speculative and too remote from the judge's investment in a different bank. 802 F.2d at 786-87. Mrs. Pollack's imminent realization of $30 million from the deal which Drexel is financing is hardly so speculative or remote.

Finally, I turn to the appropriateness of mandamus in this situation. While mandamus is indeed an extraordinary remedy, no cases have been cited that would bar the issuance of the writ in a situation as extraordinary as that before us. On the contrary, we have repeatedly held that mandamus is appropriate in recusal motions, believing that there are "few situations more appropriate for mandamus than a judge's clearly wrongful refusal to disqualify himself." *In re International Business Machines Corp.*, 618 F.2d 923, 926 (2d Cir. 1980) (quoting from *Rosen v. Sugarman*, 357 F.2d 794, 797 (2d Cir. 1966)). *See also In*

*re United States*, 666 F.2d 690, 694 (1st Cir. 1981) (public confidence in the courts requires that questions of disqualification must be disposed of at the earliest possible opportunity). Moreover, we have held that the standard for review of a judge's refusal to recuse himself is *not* an abuse of discretion standard. Rather, we must query whether the trial judge could exercise that discretion in the face of a "personal, extrajudicial bias which precludes dispassionate judgment." *In re International Business Machines*, *supra*, at 926.

Fortunately, the proceedings in the suit brought by the SEC have just begun, and in the private civil cases discovery and pretrial proceedings are still underway. It is not unusual for cases to be transferred to other judges in the court as the need to do so arises. In addition to Judge Pollack, there are presently 23 active district court judges in the Southern District of New York and more than a dozen senior district judges who still sit. In the case before us, in which Drexel is underwriting a transaction in which Judge Pollack's wife will receive $30 million, we must act to avoid compounding the harm already done to the public's perception of the integrity of the judiciary.

A central pillar of our government is the people's confidence that our courts are free of bias or favor and are administered by judges who are unquestionably impartial. Whenever any reasonable basis to doubt a judge's impartiality exists, this public trust demands that we act swiftly and decisively.

We should grant the petition for mandamus and direct Judge Pollack to recuse himself.

**APPENDIX B**

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 88-3060

Filed February 21, 1989

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-first day of February, one thousand nine hundred and eighty-nine.

In re Drexel Burnham Lambert Incorporated,
Drexel Burnham Lambert Group Incorporated,
Michael R. Milken, Lowell J. Milken,
Cary J. Maultasch, and Pamela R. Monzert,

*Petitioners.*

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for petitioners,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing en banc having been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal, a request that a poll be taken thereon having been

made, and a vote having been taken thereon and a majority of the active members of the court not having voted in favor thereof, it is further

Ordered that said petition containing a suggestion for rehearing en banc is DENIED. An opinion of Judge Meskill concurring in the denial of the petition; an opinion of Judge Pierce, concurred in by Judges Meskill, Cardamone and Miner, concurring in the denial of the petition; and an opinion of Judge Miner, concurred in by Judges Meskill, Cardamone and Pierce, concurring in the denial of the petition; and an opinion of Judge Newman, concurred in by Judges Kearse, Pratt and Altimari, dissenting from such denial, are filed herewith.

ELAINE B. GOLDSMITH,
Clerk

/s/ ELAINE B. GOLDSMITH

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MESKILL, *Circuit Judge*, concurring in Judge Pierce's concurrence in the denial of rehearing *in banc*:

Although I was not a member of the panel hearing this matter, I concur with the sentiments expressed by Judge Pierce, who was a majority member of the panel, in his concurrence in the denial of rehearing *in banc*.

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PIERCE, Circuit Judge, with whom MESKILL, CARDAMONE and MINER, Circuit Judges, join, concurring in the denial of rehearing in banc:

I write in concurrence with the majority which has denied rehearing in banc. The dissenting opinion is correct

in implying that such statements are infrequently made. However, the publication thereof makes it appropriate to state another view.

Whether the district judge's impartiality might reasonably be questioned on the facts and circumstances present in this case should not be assayed on a record that is so antiseptic as to cause this court to be oblivious to the serious charges of judge-shopping made by respondents in their briefs and submissions. Although no findings have been made regarding this aspect of the case, it cannot be gainsaid that the question of alleged judge-shopping is a significant contextual matter. The presence of the judge-shopping issue in the case places upon this court the burden of scrutinizing with exceptional care the petitioners' efforts to have the district judge disqualified from continuing to preside over this litigation.

Most of the subject litigation was assigned to Judge Pollack in 1986 and 1987, and substantial pretrial activity had occurred by September 1988 when the SEC filed a 184-page civil complaint against Drexel in a civil enforcement action; it too was assigned to Judge Pollack. None of these actions involves Palais Royal, Inc. or the judge's wife, a major shareholder.

Soon after the SEC action was assigned to Judge Pollack, Drexel, at Bain's instance, took on the funding burden of Bain's purchase of Palais Royal. Drexel then engaged in an undisputed course of conduct with respect to Bain's acquisition of Palais Royal, all the while knowing that the subject litigation was assigned to Judge Pollack. Thus, the respondents in effect contend that Drexel, by its own actions, set the stage to seek the removal of the judge who had presided over much of this litigation for approximately two years. Are litigants to have the power

by their own actions to veto the assignment of judges? Additionally, in considering the merits, the panel majority was confronted with the reality that Drexel owed no duty whatsoever to Palais Royal or to the district judge's wife, and it therefore concluded that Drexel's participation in the financing role it chose to assume was too remote from Bain's acquisition of Palais Royal to require Judge Pollack's disqualification. Under these circumstances, would a reasonable observer believe that Judge Pollack's refusal to recuse himself created an appearance of impropriety? Isn't the exceptional grant of a writ of mandamus to be made only when there is a clear and indisputable right to it? *See Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 18 (1983).

More problematic is the district judge's accusation of professional lapses by the firm representing a petitioner. In this demonstration of sensitivity to the question of whether counsel had transcended acceptable professional bounds, the district judge came perilously close to the indistinct line beyond which recusal is required.

However, two grounds militated against requiring his disqualification based on this episode: to begin with, the caselaw draws a distinction between a judge's conduct toward counsel and his conduct toward counsel's client. *See In re Cooper*, 821 F.2d 833, 841 (1st Cir. 1987); *Rosen v. Sugarman*, 357 F.2d 794, 798-800 (2d Cir. 1966). Although hostility directed at counsel *can* reach bounds which warrant relief if it appears that the client will be harmed, in the panel majority's view such is not the case here. Moreover, this conclusion is supported by the fact that no final determination was or will be made by Judge Pollack regarding the charges levelled at counsel. Rather, in accordance with the district court's rules, the issue has

been referred to that court's chief judge and to the court's appropriate disciplinary panel for their consideration and presumably for ultimate determination. *See* Rule 4(i), General Rules, Rules for the United States District Courts for the Southern and Eastern Districts of New York (1987).

Most importantly, in the event that Judge Pollack should demonstrate partiality in handling this litigation, and should it result in the denial of a just and fair outcome for Drexel, such bias would be a weighty issue to be raised by Drexel on a direct appeal, especially since the applicable standard of review would no longer require Drexel to show that it had a "clear and indisputable" right to relief, the standard which is applicable to petitions for writs of mandamus but not to direct appeals.

I concur in the court's majority view that this is not a proper case for in banc review.

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MINER, *Circuit Judge*, with whom MESKILL, CARDAMONE and PIERCE, *Circuit Judges*, join, concurring in the denial of rehearing in banc:

Merely to record my vote to deny rehearing in banc would be to permit the "expression of views" in the dissenting opinion to go unchallenged. It seems to me that the sensitive nature of the issues before us compels a reasoned rebuttal of the dissenters' conclusions. I therefore write separately to give my reasons for concurring in the majority determination.

In banc review is warranted "(1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a

question of exceptional importance." Fed. R. App. P. 35(a). In suggesting in banc review in this case, petitioners have neither demonstrated a lack of uniformity in our decisions relating to recusal of district court judges nor identified a legal question of transcending importance. Rather, the panel majority has applied well-settled rules to the specific facts of this case in deciding that the petition for writ of mandamus should be denied. Neither the panel dissenter nor the in banc dissenters contend that the applicable rules should be changed. Accordingly, the standard for in banc review simply has not been met.

To determine whether Judge Pollack's impartiality might reasonably be questioned, *see* 28 U.S.C. § 455(a), the panel majority properly reviewed as an "objective observer," *Liljeberg v. Health Services Acquisition Corp.*, 108 S. Ct. 2194, 2203 (1988), the facts and circumstances surrounding the sale of Palais Royal stock by Mrs. Pollack to a buyer whose purchase was financed by Drexel Burnham Lambert Inc. That review revealed:

> Mrs. Pollack has had no business or other dealings with Drexel; she will receive no money from Drexel; and Drexel is not essential to the completion or success of the transaction. Moreover, there is no nexus, direct, indirect or otherwise, between the civil suits pending before Judge Pollack and Mrs. Pollack's interest in Palais Royal.

*In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1314 (2d Cir. 1988).

It seems quite unexceptional to draw from these findings an objective conclusion that no appearance of partiality would be provided by Judge Pollack's continued service in the actions against Drexel. It certainly cannot be said that Judge Pollack, by reason of Drexel's financing of

the Palais Royal deal, has any personal prejudice regarding the parties or personal knowledge of the facts underlying those actions, *see* 28 U.S.C. § 455(b)(1), or that he or his wife have any financial interest that could be affected by the outcome of those proceedings, *see* 28 U.S.C. § 455(b)(4). Nor were these conclusions affected when Drexel put up some of its own money to close the deal and thereafter acquired an equity in the purchaser, all of which was contemplated by the panel majority. The "flow of substantial sums" to Mrs. Pollack from Drexel, referred to by the in banc dissenters, was much too indirect and circuitous a movement to lead reasonable, objective and impartial observers along the path taken by my dissenting colleagues.

That Judge Pollack referred to a grievance committee charges of professional misconduct involving an alleged breach of his wife's confidence on the part of certain attorneys representing a Drexel officer is not an indication of "personal bias or prejudice concerning a *party*," 28 U.S.C. § 455(b)(1) (emphasis added). Neither does it present a situation in which the Judge's impartiality might reasonably be questioned, *see* 28 U.S.C. § 455(a). A judge who reports a violation of the Code of Professional Responsibility, whether involving himself, a member of his family or someone else, should not face recusal for that reason. All lawyers are encouraged to bring to the attention of the appropriate authorities perceived violations of the ethical standards of the bar. *See* Model Rules of Professional Conduct Rule 8.3 (1983); Model Code of Professional Responsibility DR-103(A) (1980). It would be much too easy a matter for an attorney to engage in some minor breach of the Canons of Ethics directed against the Judge or a member of the Judge's family if recusal could be forced by that means. If recusal is not warranted where the

judge holds an attorney in criminal contempt, *see Rosen v. Sugarman*, 357 F.2d 794, 799-80 (2d Cir. 1966), it should not be warranted where there is merely a *referral* to an appropriate authority to determine if there has been any misconduct. Involved in that referral here is only one of nine firms representing petitioners, and the *parties* to the underlying litigation can have no reasonable basis to question Judge Pollack's impartiality because he has raised, but not resolved, a question of professional ethics.

My dissenting colleagues say that the litigation continues under a "cloud" because the panel majority applied mandamus standards and the recusal questions may again be presented on plenary appeal. However, the panel has ruled on all the significant issues pertaining to recusal that have been raised up to this point. Its conclusions merely were "reinforced" by the stringent requirements for success on a mandamus petition. 861 F.2d at 1316.

Finally, a majority of the active judges of this court have determined to deny rehearing in banc. Under such circumstances, it ill behooves the dissenters to suggest that it would be an act of "judicial statesmanship" for the district judge to request that the case be reassigned—a request that we now have decided he need not make.

---

JON O. NEWMAN, *Circuit Judge*, with whom KEARSE, PRATT, and ALTIMARI, *Circuit Judges*, join, dissenting:

We respectfully dissent from the denial of rehearing in banc. Though a statement of reasons for such a dissent is often neither needed nor useful, we believe an expression of views is appropriate in this instance.

The Court has been asked to rehear the panel decision denying a petition for mandamus seeking recusal of the District Judge in this case. *See In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307 (2d Cir.1988). Two circumstances bear upon the question of recusal:

1. The Judge's wife is to receive approximately $30 million in connection with her sale of stock in a family business, and the financing of the stock purchase is being arranged by Drexel Burnham Lambert Inc., one of the parties in litigation now pending before the Judge.

2. The Judge has referred to a grievance committee charges of professional misconduct by some of the lawyers in the pending litigation based on allegations that they have breached the confidence of the selling shareholders, including the Judge's wife.

The reasons why the first circumstance requires recusal have been forcefully set forth in the panel dissenting opinion of Judge Lumbard. At the time of the panel opinion, Drexel's role was solely that of financier for the purchaser. It is now alleged by counsel for two of the petitioners that Drexel's role in the now completed transaction has increased since the Judge's ruling: Drexel put up nearly $200 million of its own money as a bridge loan and directly and indirectly acquired 8.5% of the equity in the purchaser. The flow of substantial sums of money from Drexel, the litigant before the District Judge, to the Judge's wife, is now more direct than before.

The second circumstance places the Judge in the role of adversary, on behalf of his wife, to counsel now appearing in the litigation before the Judge. Though a judge need not and should not recuse when, solely in his capacity as a judicial officer, he observes attorney conduct that warrants inquiry by an appropriate disciplinary body and calls

such conduct to the body's attention, *see In re Cooper*, 821 F.2d 833, 842-44 (1st Cir. 1987) (recusal not warranted where trial judge condemns attorney's conduct as violation of Code of Professional Responsibility); *cf. Rosen v. Sugarman*, 357 F.2d 794, 799-800 (2d Cir. 1966) (recusal not warranted where trial judge held attorney in criminal contempt for courtroom conduct), the present situation involves the District Judge, not solely as a presiding judicial officer, but as the husband of a principal victim of the attorneys' alleged ethical violation.

These are extraordinary circumstances, raising profound questions as to the standards for recusal and the role of this Court in maintaining the highest standards of judicial propriety in this Circuit. Some of us believe that rehearing in banc is warranted by at least one of these circumstances and some believe it is warranted by both circumstances. All of us believe that rehearing in banc should be ordered.

The panel that denied the mandamus petition applied the strict standards for mandamus and concluded that circumstances known to the panel at the time of its decision did not demonstrate that "clear" and "*indisputable*" right to mandamus that is required for issuance of the writ. *See In re Drexel Burnham Lambert Inc.*, *supra*, 861 F.2d at 1312 (emphasis in original). Even though that decision will not be reconsidered in banc, serious questions concerning recusal remain in the case and will be available for plenary review by the panel that will consider any appeal that may be taken from the final judgment. It would be unfortunate if this important litigation were to continue under such a cloud. As with any in banc vote, the denial of rehearing does not necessarily signify agreement with the panel opinion. *See Peter Pan Fabrics, Inc. v.*

*Dixon Textile Corp.*, 280 F.2d 800, 805 (2d Cir. 1960) (Waterman, J., concurring in denial of rehearing in banc). Thus, the fact that a majority of the active judges of this Court have voted not to rehear the mandamus ruling in banc is not necessarily an indication that a majority of this Court believes that the District Judge's continued participation is proper.

We urge the District Judge, now that his recusal ruling has been upheld upon the narrow review appropriate to a mandamus petition, not to jeopardize the outcome of this litigation by continuing a role that poses substantial risks of ultimate reversal. Several factors warrant his reconsideration. First, there have been developments since his ruling that strengthen the case for recusal. Second, there is an impending settlement of a portion of the litigation. Third, the Judge's ruling reveals that in one important respect he misconceived the reasons for recusal. He stated the reasons to be that Drexel would not want "to bear the burden" of a favorable, though deserved, ruling on the merits of the case and that an unfavorable ruling might be perceived as attributable to a failure of the stock sale to happen. *SEC v. Drexel Burnham Lambert Inc.*, No. 88 Civ. 6209 at 6 (S.D.N.Y. Oct. 17, 1988). Though rejecting these concerns as "far-fetched," *id.*, he failed to consider the entirely valid concern that no litigant should have to endure the risk that a judge, encountering circumstances that show a basis for partiality, might bend over backward to rule against the litigant on close questions in order to demonstrate impartiality. *Cf. Cooke v. United States*, 267 U.S. 517, 539 (1925) (substitution of trial judge sometimes warranted in criminal contempt matters to avoid risk that judge might "bend backward" in making ruling).

An alternative to reconsideration would be for the Judge to seek the advice of the Advisory Committee on

Codes of Conduct, the committee of the United States Judicial Conference authorized to provide advice concerning the Code of Judicial Conduct for United States Judges.

Under all the circumstances, it would be an act of judicial statesmanship for the District Judge to request that the litigation now be reassigned.

## APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ORDER NO. 37
THIS DOCUMENT RELATES TO ALL CASES:

MDL Dkt. No. 732
M21-45-MP

In re IVAN F. BOESKY SECURITIES LITIGATION

88 Civ. 6209 (MP)

SECURITIES AND EXCHANGE COMMISSION,

*Plaintiff*,

—against—

DREXEL BURNHAM LAMBERT INCORPORATED, *et al.*,

*Defendants.*

*Opinion*

Two motions are before the Court in these related actions. The first seeks recusal of the Court pursuant to 28 U.S.C. § 455 in 88 Civ. 6209 (MP) and the second seeks similar relief in MDL Dkt. No. 732; M21-45-MP as to the 13 lawsuits in those dockets. Both motions will be handled together in this Opinion and Order.

The evidentiary facts are adequately and properly detailed in the opposing papers of the Securities and Exchange Commission.

The papers on these motions evidence the following essential and decisive ultimate facts:

The transaction about which the defendants Drexel and their officers and directors complain is the all-cash contract of sale with Bain Venture Capital signed on June 29, 1988 by Moselle Pollack—Judge Pollack's wife—and others in Mrs. Pollack's family, selling their entire stockholdings in a family retail corporation, Palais Royal, Inc. of Houston, Texas. The sale was made to the wholly owned subsidiary of Bain (SHI) organized to receive the ownership of the Palais Royal stock. The closing is scheduled for October 31, 1988. No member of the controlling family will have any continuing interest either as an employee or otherwise in the company or in the purchaser. Under the agreement, Bain has the obligation to "use its best efforts to obtain the financing necessary for the consummation of the transactions . . . from a bank or banks or other institutional lenders on terms reasonably satisfactory to [Bain]." (Exh. B p. 20 annexed to motion papers)

Drexel has had no business or dealings with Palais Royal, with Mrs. Pollack, or any of the other selling stockholders. Its own internal memoranda state that its role is to act as a "consultant" to Bain, or as a "best efforts" "underwriter or placement agent" of 10-year senior subordinated notes to be issued by SHI, which represents only about one-fourth of the funding of the global merger, which Bain has undertaken in the premises. (Exhs. A, C, D).

There is no financial or business connection, or other relationship between Mrs. Pollack and Drexel. Nor, as the defendants incorrectly intimate or say, is Mrs. Pollack selling any of her stock to Drexel, nor are they buying anything from her. Admittedly there is "no privity" whatever between Mrs. Pollack and Drexel on anything to do with the transactions involved. She will receive no money from Drexel. Hers is not a Drexel-financed transaction.

The only contract of the Palais Royal stockholders in the premises is with Bain (SHI) and that is not subject to negotiation by Drexel or even by Bain (SHI). (See the contract of June 29, 1988). The selling stockholders were pointedly excluded, were expressly barred by Bain from sitting in or participating in Bain's dealings with their prospective money lenders and from knowledge of Drexel's attempted procurement of the sales

agency for the private placement of Bain's (SHI's) senior subordinated 10-year promissory notes and other loans to Bain (SHI). There is simply no reasonable basis for doubting the Court's impartiality in this case by reason of the Palais Royal stock sale; no facts, no rational basis, have been supplied.

To the array of factual data against their contentions and the utter and admitted lack of any privity between Mrs. Pollack, her stockholdings, and their sale to Bain, Drexel's lawyers retort, "so what"? (Reply Br. 6)

The defendants' second contention is even more bizarre than the first; it is that 28 U.S.C. § 453(b)(4) applies here because the outcome of the proceedings herein could be substantially affected if Mrs. Pollack were to complete her sale to Bain (SHI). Self-evidently the Commission's civil action against Drexel and others has nothing to do with the sale of Palais Royal stock by Mrs. Pollack.

The choice to accept Drexel as Bain's agent for the placement of debt securities is the unrestricted and voluntary choice to be made by Bain with which Palais Royal and its stockholders have nothing to say and no concern; indeed, as already indicated, they have been blocked by Bain from any participation in Bain's choice of agents to place Bain's securities.

On the other hand, the placement of the promissory notes of SHI and the further possible bridge loan appear to present a highly profitable business opportunity for Drexel, one which they voluntarily seek to accept.

The Commission presented proof from an outstanding expert in the field, one whose expertise was acknowledged on the record by Drexel's lawyer, who stated in his opinion:

> The transaction proposed by Bain, including the acquisition of Palais Royal for cash, is not a difficult deal to finance. Nothing about the transaction requires financing or restructuring skills unique to Drexel. . . . Drexel is not indispensable to either the completion or success of this transaction.
>
> A number of investment banking firms are capable of providing bridge financing and senior subordinated debt financing in the amounts sought by Bain and on the terms

> offered by Drexel. Absent a material adverse change in the financial markets and the economy, in my opinion this deal will be financed with or without the participation of Drexel.

The legal position of Drexel Burnham as argued to the Court is, in counsel's words:

> This court should recuse itself because my client is entitled to judgment of a court whose impartiality cannot be questioned, even though those questions would be entirely without basis in fact. In the end, of course, it is for this court, Judge Pollack, to make the determination whether this court should recuse itself from these cases involving Drexel Burnham.

The moving parties assert: "We would have been derelict and in violation of our professional obligations, both to this court and to the public, if we were to allow these litigations to proceed while these facts remained undisclosed." Thus to test themselves, they put the following hypothetical to themselves:

> What would be the public response [if this court] . . . were to determine this highly publicized enforcement action . . . in favor of Drexel Burnham and against the SEC?

And in another hypothetical they pose the further question to themselves:

> What would be the public response, the response of a reasonable person in all these circumstances if, as very likely might well arise, we were to move for the depositions of certain key witnesses, including Mr. Boesky, and this court were to grant us the right to depose Mr. Boesky over the vigorous opposition of the United States Government; would the public react unfavorably to that and feel that in some way Your Honor had not acted with complete impartiality?

The moving parties then respond to their speculations:

> We are here because we believe we are entitled not only to a fair and impartial determination of this case, but to a determination of this case which no one can question as possibly having been tainted by extraneous matter. The issue in this case is not whether this court can be impartial. The issue in this case is a basic issue of the appearance of justice and the appearance of impartiality.

The moving parties wind up their speculative hypotheses with an appropriate question suggested by a decided case: "whether a reasonable member of the public at large, aware of all the facts, might fairly question the court's impartiality."

Thus the fundamental argument for recusal is that hypothetical decisions hereafter might be made by the Judge which will be favorable to Drexel, albeit deservedly, and would be perceived by reasonable members of the public to have been made because of the sale of Palais Royal stock to Bain Venture Capital. It is suggested that Drexel would not want to bear the burden of such success. Or, on another speculation, were there to be unfavorable decisions the reasonable public perception would ascribe them to the failure of the stock sale to happen.

These perceptions concocted by the moving parties, grounded on a remote transaction, seem so far-fetched as reactions of a reasonable person, as to be ludicrous and hardly a basis for a Judge to step aside from cases and related matters which he has been administering for upwards of 15 months and hardly to be attributed to normal perceptions of reasonable persons in the light of the actual facts and circumstances herein. To follow the line of thinking of the moving parties would place in the hands of a party a basis in every case for claiming a recusal by reason of having brought factually unfounded accusations of lack of impartiality—a mischievous notion.

This court can confidently respond, unhesitatingly, that under all the actual facts and circumstances herein, it has no doubt that a reasonable person, a member of the public, would fail to perceive even the slightest doubt of the appearance of the Judge's impartiality.

In sum:

The antics of counsel in attempting to frustrate the filing of the Commission's complaint herein, are an affront to the civility which must attend the conduct of litigation. The case is as clearly related to the earlier 13 cases before the Court as the interest of my wife and her family is unrelated to the merits of this litigation.

Much valuable time and attention have been drawn away on illusory diversions. The playing field is level as it has been for the more than 20 years of service in this Court. We are interested only in the merits and due process with the issues forthwith.

Motions Denied.

So Ordered

Dated: October 17, 1988

MILTON POLLACK

Senior United States District Judge

## APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

88-3060

In re DREXEL BURNHAM LAMBERT INCORPORATED *et al.*,
*Petitioners.*

[Form Omitted]

ORDER

IT IS HEREBY ORDERED that the motion seeking a stay of this Court's mandate pending application for certiorari is granted for a period of 30 days from the date of this order.

/s/ J. Edward Lumbard

/s/ Richard J. Cardamone

3/7/89
Date

/s/ Lawrence W. Pierce
Circuit Judge

## APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 88-3060

SDNY, Pollack 88CV6209

Filed: October 20, 1988

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 20th day of October one thousand nine hundred and eighty-eight.

Present:

HONORABLE J. EDWARD LUMBARD

HONORABLE RICHARD J. CARDAMONE

HONORABLE LAWRENCE W. PIERCE

*Circuit Judges,*

IN RE: DREXEL, BURNHAM LAMBERT INCORPORATED, DREXEL BURNHAM LAMBERT GROUP INCORPORATED, MICHAEL R. MILKEN, LOWELL J. MILKEN, CARY J. MAULTASCH, and PAMELA R. MONZERT,

*Petitioners.*

# ORDER

A petition for a writ of mandamus having been filed, Upon consideration thereof, it is ORDERED that an answer to said petition shall be filed by the respondents on or before 12 noon, October 28, 1988.

FURTHER ORDERED that the Clerk shall serve a copy of this order on the district court and all parties to the action in the trial court.

FURTHER ORDERED that a stay of all proceedings in the district court is granted, sua sponte, pending the determination of the petition.

FURTHER ORDERED that the application for expedited consideration of the petition be and it hereby is granted.

/s/ J. Edward Lumbard

/s/ Richard J. Cardamone

/s/ Lawrence W. Pierce

## APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MDL Dkt. No. 732
M21-45-MP
88 Civ. 6209 (MP)

In re IVAN F. BOESKY SECURITIES LITIGATION

—and—

In re DREXEL BURNHAM LAMBERT INCORPORATED, *et al.*,

ex rel.

In the matter of PAUL, WEISS, RIFKIND, WHARTON & GARRISON and ARTHUR LIMAN and MARTIN FLUMENBAUM,

*Respondents.*

Order #35

This order pertains to the parties
plaintiff and to the respondents hereto.

Upon the annexed exhibits from which a fiduciary relationship appears to exist and has existed between the respondents and PALAIS ROYAL and its STOCKHOLDERS, and it appearing that respondents may have participated herein on the pending motions for recusal of the Court adversely to PALAIS ROYAL and its STOCKHOLDERS, WITH KNOWLEDGE, actual and imputed, of the confidential business, internal affairs and plans of Palais Royal and its stockholders and with respect to sale of their stockholdings and matters incident and related thereto; now therefore,

Let said respondents show cause before this Court in Courtroom 1305 on October 11, 1988 at 11 A.M. or as soon thereafter as counsel can be heard,

WHY an investigation and hearing should not be held to determine whether respondents are proceeding herein in breach of fiduciary duties and obligations and with professionally conflicting interests in the pending matter seeking disqualification of the Court pursuant to 28 U.S.C. § 755 in respect to the interests of Palais Royal and its stockholders; and why respondents should not be required to identify and withdraw the papers on said disqualification motion which they have drafted, filed and served herein as well as their signatures thereto; and WHY the plaintiffs and any other parties should not have such other and further relief as may be just and proper.

Dated: October 10, 1988

/s/ Milton Pollack
Senior United States District Judge

[LETTERHEAD OF PAUL, WEISS, RIFKIND, WHARTON & GARRISON]

April 6, 1987

Mr. Bernard Fuchs
Palais Royal of Houston, Inc.
P.O. Box 35167
Houston, Texas 77235

Dear Bernie:

This letter will confirm our agreement with the recommendation contained in the letter to you from Deloitte, Haskins & Sells dated January 23, 1987 that Palais Royal, which has elected federal S corporation status, not elect New York State S corporation status, and that Palais Royal subject itself to New York State and City corporate franchise taxes. We understand that Palais Royal would incur minimal New York State and City franchise tax liabilities as a result of doing so. As you know, New York City does not recognize S corporation status.

We also confirm that we are not aware of any material adverse tax effects on the shareholders of Palais Royal who are New York City residents which would be caused by a decision of Palais Royal to elect federal, but not New York State, S status. Of course, the New York shareholders will have to maintain one set of tax records for federal purposes and a second set for New York purposes.

In order to become subject to corporate franchise tax in New York State and City, Palais Royal must bring itself within the taxing jurisdiction of the State and City. One way for the corporation to do so would be for it to lease an office in New York City for the convenience of its buyers when they come here. It is unclear whether Palais Royal would be required to qualify as a foreign corporation in New York if it were to take such a step.

I hope this letter addresses your concerns. Please call me if you have any questions.

Sincerely,

/s/ ALFRED D. YOUNGWOOD
Alfred D. Youngwood

cc: Mrs. Milton Pollack
Mr. George Asch

[LETTERHEAD OF PAUL, WEISS, RIFKIND, WHARTON & GARRISON]

June 1, 1987

*Personal and Confidential*

Mr. George Asch
Ashton Hosiery Company, Inc.
1140 Avenue of the Americas
19th Floor
New York, New York 10036

Dear George:

I enclose two copies of a memo to you with respect to new wills for you and Cissy and a trust for Elizabeth. I also enclose another copy of our letter to Bernie relating to New York State and Subchapter S.

With best regards,

Sincerely,

/s/ ALFRED
Alfred D. Youngwood

Enclosure

*EXPRESS MAIL*

[LETTERHEAD OF PAUL, WEISS, RIFKIND, WHARTON & GARRISON]

June 18, 1987

*FEDERAL EXPRESS*

Mr. Bernard Fuchs
Palais Royal of Houston, Inc.
10201 South Main
Houston, Texas 77025

*Palais Royal of Houston, Inc.*

Dear Bernie:

In accordance with my discussions with George Asch, I enclose a draft General Partnership Agreement between Palais Royal and Ashton Hosiery together with a draft lease.

We are looking into whether Palais Royal should be a limited partner and I will give you a call in the next day or so on that issue.

With best regards,

Sincerely,

/s/ ALFRED
Alfred D. Youngwood

ADY:ccs
Enclosures

cc: Mr. George Asch

[LETTERHEAD OF PAUL, WEISS, RIFKIND, WHARTON & GARRISON]

June 18, 1987

Mr. George Asch
Ashton Hosiery Company, Inc.
1140 Avenue of the Americas
19th Floor
New York, New York 10036

Dear George:

I enclose for your review a draft Partnership Agreement between Ashton and Palais Royale forming PRA Associates as a New York general partnership and a draft lease between PRA Associates and Ashton. As my associate Jonathan Fredman indicated to you, it is important that this sublease not be prohibited by your basic lease. If you would like us to take a look at Ashton's basic lease to confirm this, please let us know.

Please give me a call after you have had a chance to review the enclosed.

With best regards.

Sincerely,

/s/ ALFRED
Alfred D. Youngwood

Enclosure

*BY HAND*

[LETTERHEAD OF PAUL, WEISS, RIFKIND, WHARTON & GARRISON]

June 25, 1987

Mr. Bernard Fuchs
Palais Royal of Houston, Inc.
10201 South Main
Houston, Texas 77025

Dear Bernie:

I enclose four copies of the Partnership Agreement of PRA Associates and four copies of a Lease between PRA Associates and Ashton, each of which George has already executed on behalf of Ashton, as well as a marked copy of the Partnership Agreement indicating on page 4 the changes we discussed from the draft I previously sent to you.

If all is in order, please execute four copies of the Partnership Agreement and four copies of the Lease on behalf of Palais Royal and return to me two copies of each of the Partnership Agreement and the lease. I will keep one fully executed copy in our files and I will pass one fully executed copy to George when he returns from the Far East.

If you have any questions, please call me.

With best regards,

Sincerely,

Alfred D. Youngwood

Enclosures
*FEDERAL EXPRESS*

cc: Mr. George Asch (without enclosure)

[LETTERHEAD OF PAUL, WEISS, RIFKIND, WHARTON & GARRISON]

June 18, 1987

Mr. George Asch
Ashton Hosiery Company, Inc.
1140 Avenue of the Americas
19th Floor
New York, New York 10036

Dear George:

I enclose for your review a draft Partnership Agreement between Ashton and Palais Royale forming PRA Associates as a New York general partnership and a draft lease between PRA Associates and Ashton. As my associate Jonathan Fredman indicated to you, it is important that this sublease not be prohibited by your basic lease. If you would like us to take a look at Ashton's basic lease to confirm this, please let us know.

Please give me a call after you have had a chance to review the enclosed.

With best regards,

Sincerely,

/s/ ALFRED
Alfred D. Youngwood

Enclosure

*BY HAND*

[LETTERHEAD OF PALAIS ROYAL]

July 10, 1987

Mr. Alfred D. Youngwood
Paul, Weiss, Rifkind, Wharton & Garrison
1285 Avenue of the Americas
New York, New York 10019

Dear Alfred:

I am enclosing two fully executed copies of the partnership agreement of PRA Associates and two copies of the lease between PRA Associates and Ashton.

I assume that a copy of each will be forwarded by you to Geroge Asch.

Thank you for your help.

Sincerely,

/s/ BERNIE
Bernard Fuchs

BF/am
enclosures

[LETTERHEAD OF PAUL, WEISS, RIFKIND, WHARTON & GARRISON]

November 30, 1987

Mr. Bernard Fuchs
Palais Royal of Houston, Inc.
10201 South Main
Houston, Texas 77025

Dear Bernie:

I enclose our bill for professional services and disbursements with respect to various New York State tax matters and certain collateral matters with respect to your Federal Subchapter S election.

With best regards,

Sincerely,

/s/ ALFRED
Alfred D. Youngwood

Enclosure

cc: Mr. George Asch

[LETTERHEAD OF PAUL, WEISS, RIFKIND, WHARTON & GARRISON]

| | |
|---|---|
| To professional services rendered through November 30, 1987. | $12,500.00 |
| Disbursements, Lexis and other charges | 1,163.68 |
| | $13,663.68 |

* * *

| | | |
|---|---|---|
| 13,663.68 | .00 | 13,663.68 |
| 12/10/87 | 136629 | |
| 12/10/87 | 136629 | *13,663.68 |

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
1255 AVE OF THE AMERICAS
NEW YORK, NY
10019

September 16, 1988

MEMORANDUM

To George Asch From Stuart Kaperst

cc: Alfred D. Youngwood

Subject New York State Residency

Set forth below is a discussion of New York residency status that was included in a memorandum recently prepared for another client. The discussion includes a brief description of the provisions of the New York Tax Law and regulations promulgated thereunder regarding residency status and sets forth a list of factors that affect the determination of an individual's domicile and residence for New York tax purposes. The discussion is a general overview of the rules for determinations of New York residency status and does not include any analysis of your daughter's specific situation.

*Residency*

A determination of an individual's New York State residency status depends upon whether such individual is domiciled in New York. Any individual domiciled in New York is a resident of New York for tax purposes unless such individual (i) does not maintain any permanent place of abode in New York,[1] (ii) maintains a permanent place of abode outside New York and (iii) is present in New York[2] for no more than 30 days of such taxable year.[3] An individual who is not domiciled in New York will be taxed as a resident of New York only if he (i) maintains a

1 Any dwelling used in New York, including any dwelling provided by an employer, could be treated as a permanent place of abode.

2 An individual is present in New York on a calendar day for this purpose if such individual is physically present for any part of such day other than solely related to the beginning or continuation of travel to a point outside of New York. 20 N.Y.C.R.R. § 102.2(c).

3 New York Tax Law § 605(a)(1).

permanent place of abode in New York and (ii) is present in New York for more than 183 days of the taxable year.[4]

*Domicile*

Domicile is defined for New York State tax purposes as "the place which an individual intends to be his permanent home—the place to which he intends to return whenever he may be absent."[5] An individual can have only one domicile; the domicile of an individual with more than one home will depend upon which is regarded as his permanent home. The determination of where an individual *intends* to make his *permanent* home is made by reference to all of the surrounding facts and circumstances, including the taxpayer's declarations of intent and actual conduct.

Regulations promulgated by the New York State Tax Commission provide that a "domicile once established continues until the person in question moves to a new location with the bona fide intention of making his fixed and permanent home there" and further provide that the "burden is on any person asserting a change of domicile to show that the necessary intention existed."[6] Moreover, the New York courts have held that the evidence for any such change of domicile must be "clear and convincing."[7] The factors that have been taken into consideration in administrative and judicial proceedings in New York in determinations of domiciliary status include the following:

1. Character of new residence, including whether owned or leased;
2. Sale or retention of New York abode;
3. Voter registration locale;
4. Driver's license locale;
5. Automobile registration;

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4 *Id.*

5 20 N.Y.C.R.R. § 102.2(d)(1).

6 20 N.Y.C.R.R. § 102.2(d)(2).

7 *Bodfish v. Gallman*, 378 N.Y.S.2d 138, 141 (3d Dept. 1976).

6. Mailing address and telephone listings;
7. Residency of family members;
8. Locale of enrollment of children in school;
9. Frequency of presence in New York;
10. Financial holdings, including banks accounts, investment accounts and business interests;
11. Execution of will in new locale; and
12. Locale of religious and social affiliations.[8]

In the event that you are determined not to be domiciled in New York, you will be taxed as a New York resident only if you maintain a permanent place of abode in New York and are present in New York for more than 183 days of the taxable year. As indicated above, however, even if you do not maintain an apartment in New York, any dwelling that you use while in New York, any dwelling that you use while in New York may satisfy the "permanent place of abode" requirement. Consequently, if you are a California domiciliary, your New York residency determination will likely depend upon demonstrating that you are not physically present in New York for 183 calendar days of the taxable year. In this connection, you should be aware that proof of physical presence frequently becomes burdensome and difficult to determine during an audit. Many individuals who expect that they may be required to demonstrate the extent of their physical presence in New York keep a moderately detailed diary for this purpose. In addition to its possible use during an audit, such a diary helps to ensure that the 183-day limit is not inadvertently exceeded.

S.C.K.

8 New York Tax Service, Matthew Bender, Vol. 1, § 3.61 (1987).

[LETTERHEAD OF GEORGE ASCH]

October 11, 1988

MEMORANDUM

Phyllis Asch and George Asch met with Alfred Youngwood on June 2, 1988 at 5 p.m. in the offices of Paul, Weiss, Rifkind, Wharton and Garrison to discuss the possible sale of Palais Royal of Houston, the family business, and the tax implications on New York shareholders. We had had talks about this on prior occasions. At that meeting, the former connection with Goldman Sachs and present affiliation of investment banking firm were discussed, though specifics of the current sale were not detailed.

It was further decided to postpone a revision of the put agreement with Palais Royal that the Asch family enjoyed since the family intended to execute the sale contract the next week.

The memorandum of September 16, 1988 to George Asch from those attorneys was for our consideration in connection with our discussion with the attorneys of anticipated proceeds to the stockholders from the pending sale of Palais Royal stock.

The relationship of Mrs. Moselle Pollack and all stockholders to Judge Pollack was fully known to members of Paul, Weiss, Rifkind, Wharton and Garrison.

/s/ _____

## APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re IVAN G. BOESKY SECURITIES LITIGATION

—and—

In re DREXEL BURNHAM LAMBERT INCORPORATED, *et al.*,

ex rel

In the matter of PAUL, WEISS, RIFKIND, WHARTON & GARRISON and ARTHUR LIMAN and MARTIN FLUMENBAUM,

*Respondents.*

October 11, 1988
11:00 a.m.

Before:

HON. MILTON POLLACK,

*District Judge*

APPEARANCES

SECURITIES AND EXCHANGE COMMISSION
THOMAS C. NEWKIRK
BARRY R. GOLDSMITH
ROBERT B. BLACKBURN
*Of counsel*

PAUL WEISS RIFKIND WHARTON & GARRISON
*Attorney for Michael Milken*
ARTHUR LIMAN
JAY TOPKIS
MARTIN FLUMENBAUM
ALFRED D. YOUNGWOOD
*Of counsel*

CADWALADER WICKERSHAM & TAFT
*Attorney for Arden Way Plaintiffs*
GEORGE D. REYCRAFT
PAMELA R. CHEPIGA
DEBRA BROWN
*Of counsel*

WOLF POPPER ROSS WOLF & JONES
*Attorney for Class Action Plaintiffs*
STANLEY NEMSER
*Of counsel*

BERGER & MONTAGUE
*Attorney for Class Action Plaintiffs*

DANIEL BERGER
*Of counsel*

(Case called)

THE COURT: I have received this morning an affidavit of Mr. Alfred D. Youngwood and an affidavit of Arthur L. Liman and an affidavit of Martin Flumenbaum and it is now admitted in these papers that Mr. Flumenbaum and Mr. Liman knew of the representation of Palais Royal and its stockholders before serving and filing further papers in this case and concluded to remain silent and apparently took charge of the recusal motion with the papers emanating from their office. I believe they are charged with knowledge concerning the conflicting representation since 1987 and particularly June 2, 1988 and September 16, 1988, the details of which came to my attention only this past weekend.

I've decided to refer the conduct of the parties in this case for disciplinary resolution, if required, to the Chief Judge, since it is unrelated to the interests of the defendants in the matter on the claims of the Securities and Exchange Commission in litigation and even to the motions for recusal by other counsel which will be heard at two o'clock. And I will hear no more about this motion.

The clerk is directed to forward the papers to Judge Brieant accordingly. I don't have the originals of these affidavits but if they've been filed you can get them from the file. If they haven't been filed they should be.

This court is now closed.

MR. TOPKIS: Do I understand that we are instructed to be silent?

THE COURT: I am giving you no instructions. The matter is referred for all purposes to Chief Judge Brieant. You heard what I had to say. It has no relation whatever to the recusal motion by other counsel and it has no relationship to any issue in the case.

MR. TOPKIS: We expect to be before your Honor at two o'clock this afternoon.

THE COURT: That's your business, not mine.

(Proceedings adjourned)

## APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

88 Civ. 6209 (MP)

SECURITIES AND EXCHANGE COMMISSION,

*Plaintiff*,

v.

DREXEL BURNHAM LAMBERT INCORPORATED, *et al.*,

*Defendants*.

September 13, 1988
11:30 a.m.

Before:

HON. MILTON POLLACK,

*District Judge*

APPEARANCES

THOMAS C. NEWKIRK,
ROBERT B. BLACKBURN,
GARY LYNCH,
BARRY GOLDSMITH,
*Attorneys for the SEC*

CURTIS MALLET-PROVOST COLT & MOSLE
*Attorneys for defendants*
BY: PETER FLEMING,
*of Counsel*

CAHILL, GORDON & REINDEL
*Attorneys for defendants*
BY: THOMAS F. CURNIN,
*of Counsel.*

* * *

THE COURT: . . . .

Now, all I know about Bain is that they are the financing arm of a financial consulting company up there in Boston also called Bain something and the only relationship that the stockholders have had has been a contract with Bain who was going to buy them out after they got through with their investigation of the finances and this, that and the other thing and they had arranged to talk to Bernie Fuchs, who is the present president.

Bernie Fuchs' history was 18 or 20 years ago he came in as an assistant vice-president or a vice-president and when Mrs. Pollack's husband died, her first husband, she was named the president and continued in that capacity I think until about five or six or seven years ago—I don't know the dates—at which time, through the inexorable passage of time, I won't tell you how old she is but she is not young, she turned the mantle over to Bernie Fuchs and he has been the president.

What I understand is that Bain then made some kind of an arrangement with Bernie Fuchs that he was to continue and be named as chairman of the board of the venture that they were buying and from that time on, I just learned this yesterday, the senior vice-president in charge of finances, Marvin Kaplan, and the senior vice-president in charge of operations, Rodney Margolies, two sons-in-law of Moselle Pollack were excluded by express request from any discussions whatever that Bain was having with Fuchs about what they were going to do, how they were going to do it and who they were going to borrow money from in order to carry out this purchase and what was going to happen and it hit me like a ton of bricks when I heard Peter say that Drexel Burnham was involved in this thing in some way.

Certainly no stockholder and none of the family knew what they were going to do, apparently, after this contract was made between the stockholders and a subsidiary of Bain. Some name that begins with an S, I don't know what the name is, that subsidiary was organized to make the arrangement and the payment that was going to be made by Bain and Citibank Venture Capital. Those two were putting up the money and that's what I believe the stockholders knew of. Period. End of that.

Who they approached, how many they approached, what the status is of those approaches and so on is completely unknown to me and I was tempted to call up Bernie Fuchs and find out what was going on and I said, wait a minute, what am I doing in this thing trying to get information that I don't have now which Rodney and Marvin bore out— . . . .

I am very much disturbed that this thing comes up this way with two people for whom I have the regard as I do of these people because I don't think that they are run-of-the-mill people who in representation of clients commit professional improprieties, but I sure don't like the way it was presented to me with the comment that Mrs. Pollack was going to get millions from Drexel.

Actually, she doesn't get her hands on any part of it because of her estate and I will say I don't get any part of it and I will tell you another thing out of school. I get nothing from her regardless of who survives. I don't intend to have it. I had nothing to do with the business. That's the story.

* * *

MR. FLEMING: It was in that connection that Tom and I placed a conference call at 20 minutes of 5 on Saturday afternoon when you were watching the Yankee game.

THE COURT: Did you record it, Peter?

MR. FLEMING: I did not, your Honor. I wish I had in view of what you said because I did not make that representation.

THE COURT: If you had, I would have held you in contempt.

MR. FLEMING: The second point—

I am surprised you would ask me that question. Judge, actually—

THE COURT: I just want to know how far this goes in the representation of a client.

MR. FLEMING: I am surprised you would ask me the question but, putting that aside, the failure to advise the Commission before we called the court is my fault and it was not a thinking decision but an unthinking decision.

Sunday morning I was in my office, actually reading the Commission's complaint and analyzing it, and I called Gary at his number I guess about 9:30 or 10 o'clock—

MR. LYNCH: It was just before 9 a.m.

MR. FLEMING: —Sunday morning and advised him rather briefly of what this was about. That Judge Pollack had advised us that he would meet with us on Tuesday and a date to be fixed probably on Monday or Tuesday.

THE COURT: Let me ask you this question: Did you foresee this as something that might result in my being favorable toward or partial toward Drexel? Is that why you called me?

MR. FLEMING: I'll tell you exactly why I called you, Judge.

THE COURT: Just answer me that question. I want to know. Did you think I was going to favor Drexel because of this cockamamie story that you were working on?

MR. FLEMING: I gave no thought to that issue whatsoever, nor have I given any thought to that issue. What I did give serious thought to and that is why I was persuaded by Judge Rifkind and I am convinced this was in Judge Rifkind's mind, I wanted your Honor to know this as soon as possible because I didn't know when, if ever—

THE COURT: Know what?

MR. FLEMING: To know what Tom will relate to you. The effect on your Honor is something I had given no consideration other than your Honor be advised of the facts.

THE COURT: They are here now and whatever you have to say affects them. I don't see how it affects your client except that—unless you were trying to imply, as I understood you were implying, that I was in Drexel's camp somehow or other and they didn't know about it.

MR. FLEMING: I am talking about appearances. I am not analyzing the situation.

THE COURT: You were attacking me professionally.

MR. FLEMING: No, we were not. You know me from a long while and I have never enjoyed arguing with any court and particularly with your Honor.

We are not attacking you professionally. We felt a professional obligation and Judge Rifkind confirmed that we should advise you of these facts. That is not an attack. That is information.

If I could start, your Honor, because I am flatly concerned about something else. This really has to do with what started

this in the beginning and that is the relation of this case to this court by the Commission.

THE COURT: I am not going to let you get into that in this discussion. That is a separate subject entirely.

MR. FLEMING: Can I ask just two questions?

THE COURT: I read the newspapers about that.

MR. FLEMING: I wasn't there.

THE COURT: I don't want to have this matter clouded in any way by anything to do with the first attempt to nudge me out of the case. Forget it, please. I know why I asked for this meeting and it has to do with whether I am in any way anybody's man in this case.

MR. FLEMING: Your Honor, I want to respond to what you said about nudging you out of this case. The question in this case to me is the way in which the system in the Southern District of New York is administered and that is the only question.

THE COURT: You take that up with the Bar Association and with the rest of the court.

MR. FLEMING: Very good. I would like, if I could, to ask one question with regard to the filling out of the civil cover sheet on the SEC filing.

THE COURT: That is another subject that is not before us now in this closed session.

MR. FLEMING: Very good.

THE COURT: It is a subject you can argue out publicly if you want to.

MR. CURNIN: Judge, let me add a footnote if I can to what Peter said and—

THE COURT: It was your office that raised a fuss initially sometime back about somebody who had been making approaches to me on the other side of the fence and we straightened that out and got an understanding that that was not what was intended but that was the effect of it.

Here we are number two with the same kind of a thing.

* * *

THE COURT: Are you saying to me that for discovery purposes these 14 or 15 or 16 cases, plus this one, should not be consolidated?

MR. FLEMING: I am saying the following, your Honor—

THE COURT: Is that what you are saying?

MR. FLEMING: I am saying the following: I am saying that where the form says, fill in only if you intend to move for consolidation and you do not intend to move for consolidation, then I don't think you can sign that form and I think you would criticize me if I signed the form.

THE COURT: Come on. Come on. That's a small reed to hang onto. Anyway, go ahead, Tom, and finish up.

MR. CURNIN: That was the point in placing the call and—

THE COURT: About whether they intended to consolidate?

MR. CURNIN: No. Judge, let me tell you something: The question of consolidation or not consolidating, is it a related case or isn't it a related case, had nothing to do with Peter's and my discussion as to whether or not we would inform you and when we would inform you of this fact. Believe it or not, Judge Pollack—

THE COURT: Did you get a copy of the contract before you called me?

MR. CURNIN: No, Judge, because I didn't think it was necessary.

THE COURT: Are you for real?

MR. CURNIN: Yes, Judge, I am for real. What I thought was important and what Peter thought was important—

THE COURT: You mean you don't know at this point as to who the stockholders contracted with?

MR. CURNIN: I know what information—

THE COURT: Other than what I told you this morning?

MR. CURNIN: Judge, I am going to give you all the information and give the SEC all the information I have.

THE COURT: Look, Tom, don't avoid me. Are you saying you don't know what the contract says and with whom the stockholders contracted?

MR. CURNIN: I believe that I have a general understanding of who the parties are and what the obligation is. I do not know all the detail of it and I conveyed to your Honor and Peter and we jointly conveyed to your Honor whatever information we had and we believe that the information we had was sufficient

and important enough that you should be informed of it right away.

THE COURT: I want to tell you something. If you fellows had put that in an affidavit and come up on a Rule 11, you would have gotten whacked. You didn't make any investigation at all to find out what you were talking about before you approached a judge who was handling a lawsuit?

MR. FLEMING: That's not true.

MR. CURNIN: This is the background in which this was going on, consider this: We knew—

THE COURT: Your client is upset because it says something about the Commission and the Commission says something about your client, but you are implicating me. That's where I come in.

MR. FLEMING: Judge, let me ask you a question. Would you have preferred that we not tell you?

THE COURT: I would have preferred that you called them on the telephone and said, look, we think there is something about the partiality or impartiality of the Judge. Let's talk to him. That's what I think Peter Fleming would have done if he were still in the U.S. Attorney's office.

MR. FLEMING: I would never have raised that question with Gary in a telephone call. What I should have done, as your Honor says, I should have called Gary on Saturday instead of Sunday. I will concede that. That was not a thinking decision on my part.

I am saying would your Honor prefer we not provide this information to you in the circumstances of this case?

THE COURT: Certainly I want the information, but I don't want it ex parte.

MR. FLEMING: I have already said that was my mistake. It was not a thinking mistake.

* * *

MR. LYNCH: There were telephone calls between counsel who were present in Washington and I know there were telephone conversations between Mr. Curnin and John Steck.

MR. CURNIN: I asked him if he could tell me he would not file and he said no—

MR. FLEMING: Let Tom finish. The situation on Wednesday, Judge, you've got an institution which does literally millions and millions of dollars worth a day. This investigation and the authorization, the recommendation, all of the newspapers, we say—

THE COURT: That is like the cases that Peter Fleming used to prosecute all over the newspapers. Remember Kelly and Imp?

MR. FLEMING: Never leaked, your Honor.

THE COURT: Okay.

MR. FLEMING: So we are representing this corporation with all of the credit situations that exist and we are told, we are not going to tell you when we are going to file, we are not going to tell you anything.

Tom said he thought Labor Day because the summer was over and he called down there and they would not tell us a thing, whether they would file or not. They can do that, but we have a right to have people covering the courthouse so that our client can be informed so he can take whatever steps he has to take.

THE COURT: You are not telling them your strategy, either.

MR. FLEMING: We tried to.

THE COURT: You didn't tell them about calling me up. That is the first piece of strategy.

MR. FLEMING: That was not a piece of strategy. If you can't accept that, then you can't accept my word any longer.

THE COURT: It is rankling me awfully hard because I think you moved on inadequate information as to where Moselle Pollack and her family stand.

MR. FLEMING: Judge, very simply, would you have liked to have read that in the newspaper without us having called you?

THE COURT: It could only get in the newspaper if you put it there.

MR. FLEMING: If I could have sworn to that, I wouldn't have called you.

MR. CURNIN: Peter's question is the question that was in our minds Friday night. What would Judge Pollack—

THE COURT: I am not sitting in judgement on you or on Peter. I have told you that I know you both and I know you

both favorably and Peter has explained he thought it was a mistake.

Now the question is what do you want to do about the substance, never mind the mistake?

MR. FLEMING: Your Honor, we have not looked—we have been doing a lot of things, undertaken an extensive look at the issue of recusal. We have not talked to our client.

THE COURT: I can tell you right now you can forget the issue of recusal and that is one that I would write a very strong opinion about under the circumstances.

MR. FLEMING: If there is a determination by any of the defendants that that motion should be made, it will be made. The reason for us coming, your Honor, is because, one, to explain to you in detail as you requested of what the facts were as we understood them so you would know them and, two, because I do believe that your Honor has to consider the question of whether, as I read a case, a reasonable man would be concerned, there would be an appearance question if this thing became public.

THE COURT: Appearance of what about whom?

MR. FLEMING: The lack of impartiality one way or the other. That is the issue under the recusal statute.

THE COURT: I am telling you right now that you can notify all of your constituents and colleagues and associates that I will want whatever they have to say under oath and submitted publicly.

MR. FLEMING: That is how a motion is made, isn't it?

THE COURT: I intend to exercise whatever rights I have to sanction anybody who on the basis of insufficient information and failure to investigate and concealment of anything that might or should have been said—

MR. FLEMING: You can swear me now, Judge, if you want to talk about concealment. I will testify to that.

THE COURT: I am not talking about you. I am talking about your associates, the people that you are going to talk to about whether I should be recused.

MR. FLEMING: I am talking about co-counsel who we deliberately did not ask to come today to keep this meeting small.

MR. CURRAN: That is the reason we did it, Judge.

THE COURT: I don't want this thing to get into a standoff between the judge and the counsel because I have no feeling one way or the other for either party in the case. I don't know what the facts are. I read the newspapers. I understand that newspapers don't represent facts. They represent allegations.

MR. FLEMING: Judge, I will be very direct. I don't believe you should take this case. I will give you three reasons.

THE COURT: I have taken the case and I don't intend to give it up except for some impropriety on my part which I do not visualize exists in this matter.

MR. FLEMING: May I ask your Honor, then, whether this case will be consolidated for trial with the other cases?

THE COURT: You can ask that at the proper time.

MR. FLEMING: That's not fair.

THE COURT: When that matter is before the court.

MR. FLEMING: That is not fair.

THE COURT: That matter involves everybody in the case, all 13 or 14 cases, and is going to have to be submitted on the basis of appropriate affidavits and argument. I haven't the slightest idea. All I can tell you is that what I see in the affidavit of relatedness that this is what we the judges of this court consider a related matter at that point.

Now, you start talking consolidated, I don't know what you have in mind about unconsolidated proceedings. You are apparently saying that it should be unconsolidated, but you will argue that out in the proper forum at the proper time. It has nothing at all to do with the stockholders of Palais Royal.

MR. FLEMING: I agree with that.

THE COURT: That is the only purpose of the meeting, Peter.

MR. FLEMING: Judge, you know this question is important, it is important to the way in which justice is administered in the district. The court quite properly in my view—and I am a defense counsel—did away with the three judge choice that the U.S. Attorney was giving people who pleaded guilty. I was so happy to see the judges do away with that.

I think the related case system has been abused here—

THE COURT: You won't be deprived of the fullest opportunity that you want to talk about anything to do with a procedural aspect of the case on notice to everybody affected.

MR. FLEMING: Fine.

* * *

## APPENDIX I

### 28 U.S.C. § 455

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

Supreme Court, U.S.
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CLERK

(2)

No. 88-1628

# In the Supreme Court of the United States

OCTOBER TERM, 1988

MICHAEL R. MILKEN, ET AL., PETITIONERS

*v.*

SECURITIES AND EXCHANGE COMMISSION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the court of appeals applied the proper standards for determining judicial disqualification under 28 U.S.C. 455(a).

2. Whether a petitioner seeking a writ of mandamus from a court of appeals ordering the disqualification of a trial judge must demonstrate a "clear and indisputable" right to mandamus relief.

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals denying mandamus (Pet. App. A1-A32) is reported at 861 F.2d 1307. The opinions of the court of appeals on denying rehearing *en banc* (Pet. App. A33-A44) are not yet reported. The opinion of the district court (Pet. App. A45-A50) is not yet reported.

### JURISDICTION

The judgment of the court of appeals was entered on November 15, 1988. A petition for rehearing was denied on February 21, 1989. The petition for a writ of certiorari was filed on April 5, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

The Securities and Exchange Commission (SEC or Commission) brought this action on September 7, 1988,

alleging numerous violations of the federal securities laws by petitioners Michael R. Milken, Lowell J. Milken, and Pamela R. Monzert, and by Drexel Burnham Lambert Incorporated and Drexel Burnham Lambert Group Incorporated (collectively, Drexel), Cary Maultasch, and others.[1] The case was assigned to Senior United States District Judge Milton Pollack of the Southern District of New York. Petitioners and Drexel moved to disqualify Judge Pollack, who denied the motion. The court of appeals denied a petition for a writ of mandamus. Petitioners seek review of the court of appeals' denial of their mandamus petition.

1. a. In December 1986, almost two years before the Commission filed its suit, eleven shareholder class action suits were filed in New York and California, alleging that Ivan F. Boesky and Drexel, among others, violated the federal securities and civil anti-racketeering laws. See Pet. App. A4-A5. An additional private civil fraud action naming Boesky and Drexel as defendants was filed in March 1987. *Id.* at A5. Because of the relationship among the suits, the Judicial Panel on Multidistrict Litigation in July 1987 asked Chief Judge Brieant of the District Court for the Southern District of New York to consolidate the cases before Judge Pollack (to whom some of the cases had already been assigned) pursuant to 28 U.S.C. 1407. Pet. App. A5. The Panel's letter stated: "If related cases are filed in your district, we would anticipate that they would automatically be assigned to Judge Pollack." See SEC

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[1] Petitioners and Maultasch are all present or former employees of the Drexel corporate defendants. The three other defendants in the case are Victor Posner, Steven Posner, and Pennsylvania Engineering Corporation. The complaint alleged that the defendants had devised and carried out a pervasive scheme involving insider trading, stock manipulation, fraud on Drexel's own clients, and numerous other violations of the federal securities laws. See Pet. App. A8.

Opp. to Mandamus Pet., Add. at 5a. The cases—known collectively as *In re Ivan F. Boesky Securities Litigation,* MDL Docket No. 732, M21-45-MP—were consolidated, and Judge Pollack presided over them for the next 14 months, issuing 36 case management orders and three published opinions in that time. Pet. App. A5.

b. In June 1988, Bain Venture Capital (Bain) signed a contract with the shareholders of Palais Royal, Inc. (Palais Royal) to purchase their stock in that company for $84.5 million in cash. See Pet. App. A6. Palais Royal, a closely held company whose shareholders consisted of Moselle Pollack, who is Judge Pollack's wife, and members of her family, operated a chain of department stores in Texas. Mrs. Pollack was to receive approximately $30 million from Bain for her interest. *Id.* at A17.

The sales contract gave Bain the exclusive responsibility for obtaining the financing it needed to consummate this leveraged buyout transaction. Pet. App. A6, A47. Indeed, at Bain's request, none of the selling shareholders had any contact with potential lenders. *Id.* at A6, A46. At the time the contract was being negotiated, Bain assured Shearson Lehman Hutton Inc. (Shearson), which was acting as financial adviser to Palais Royal's shareholders, that it had had discussions with potential lenders and investment bankers and that it was confident of its ability to secure the required financing. Chapman Aff. ¶ 3 (Oct. 4, 1988). Shearson itself also anticipated that financing could be obtained. *Ibid.* According to Shearson, as long as financing could be obtained, "it was of no relevance or concern to the selling shareholders which entity or entities provided the financing for the acquisition." *Id.* ¶ 4.

During the summer of 1988, Bain solicited several investment banks and institutional lenders about providing financing for the acquisition of Palais Royal (and, as part

of the same transaction, of another department store company). See Coffman Decl. ¶ 4(c) (Oct. 4, 1988) (reporting statements of Bain officer); Moseley & McCarthy Aff. ¶ 3 (Sept. 20, 1988). Bain contacted Drexel about financing in late July, one month after Bain and the shareholders had entered into the contract. *Id.* ¶ 4. Bain was still negotiating with other investment bankers at least as late as the end of August 1988 (see Pritchard Decl. ¶ 3 (Oct. 10, 1988) (reporting conversations with institutional lenders)), but Drexel ultimately was chosen. It was Drexel's potential role in arranging financing for Bain for its acquisition of Palais Royal that was to form the basis of the motion by petitioners and Drexel to have Judge Pollack disqualified.[2]

2. a. When the Commission filed the complaint on September 7, 1988, it designated the case as related to the private actions pending before Judge Pollack. Consistent with the Multidistrict Panel's directive and pursuant to local court rule, the case was assigned to Judge Pollack.[3]

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[2] It is only *Drexel's* role in arranging financing that is at issue here, and Drexel no longer seeks to have Judge Pollack disqualified. There is no evidence in the record that petitioners themselves, as Drexel employees, were in any way involved in the transaction.

[3] Rule 15 of the Rules for the Division of Business Among District Judges of the Southern District of New York provided in relevant part:

> If it appears from the information and designation sheet or otherwise that a civil action or proceeding is related to a previously filed civil case still pending in this court, the newer case * * * shall be assigned to the same judge to whom the older case * * * was assigned * * *.
>
> Cases are related if they present common questions of law and fact, or arise from the same source or substantially similar transactions, happenings, events or relationships, or if for any other reason they would entail substantial duplication of labor if assigned to different judges.

Petitioners immediately responded with concerted efforts to keep the case from being assigned to him. See Pet. App. A18.[4]

b. In the late afternoon of Saturday, September 10, three days after the Commission's complaint was filed, two of Drexel's attorneys called Judge Pollack at his home, without first notifying counsel for the Commission, and informed him of Drexel's possible role in financing the Palais Royal transaction and his wife's interest in the transaction. Pet. App. A9; see *id.* at A19.[5] Judge Pollack

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[4] According to an affidavit submitted by the SEC paralegal who filed the complaint, Lowell Milken's attorney was waiting in the Clerk's office and attempted " 'to prevent [her] from filing the Drexel court papers.' " Pet. App. A18. At the same time, according to an affidavit submitted by an SEC attorney, one of Michael Milken's attorneys, who was also in the Clerk's office, " 'threatened that if the Commission filed its action as one related to those pending before Judge Pollack', he would seek Rule 11 sanctions." *Ibid.* When the case was assigned to Judge Pollack, counsel for petitioners and Drexel immediately proceeded to the Judge's chambers and, arguing that the case was not related to the private suits, requested that he "refrain from accepting the case until they had an opportunity to consult with other counsel." *Id.* at A18-A19.

[5] According to the individual attorneys representing Drexel and petitioners, they first became aware of Mrs. Pollack's involvement in the Palais Royal transaction on September 9, 1988. See Pet. App. A8-A9, A24. There were, however, two earlier occasions on which the fact that Judge Pollack's wife was involved in the Palais Royal transaction was or might have been made clear to Drexel or to the attorneys' law firms.

First, Drexel was represented both in its negotiations with Bain and in the *Boesky* litigation by Cahill Gordon & Reindel (albeit by different attorneys from those representing Drexel in the present suit). In late July or early August 1988, Drexel and the law firm obtained copies of the Palais Royal/Bain contract, which listed "Mrs. Moselle Pollack" as a selling shareholder. See Pet. App. A7-A8. Drexel also

expressed disapproval of the *ex parte* contact and of the failure of Drexel's counsel even to try to notify counsel for the Commission before calling him. *Id.* at A79. At Judge Pollack's request, Drexel's attorneys notified counsel for the Commission, and a conference was convened for September 13 in the judge's chambers to discuss the matter. *Id.* at A75-A76. Although recusal was suggested at the conference, on the basis of the information provided Judge Pollack reacted negatively to the suggestion. No motion for disqualification was made at that time. See *id.* at A9.[6]

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conducted a substantial "due diligence" inquiry into Palais Royal in July 1988. *Ibid.*

Second, in June 1988, Palais Royal shareholders Phyllis and George Asch, who are Mrs. Pollack's daughter and son-in-law, met with tax attorneys at Paul, Weiss, Rifkind, Wharton & Garrison to discuss the tax consequences of the sale of their Palais Royal stock. Pet. App. A8. Other attorneys from the same law firm represent Michael Milken in the present suit. Moselle Pollack's relationship to Judge Pollack and her interest in Palais Royal were evidently known to the tax attorneys at Paul Weiss. See *id.* at A56-A57 (1987 letter from tax partner regarding Palais Royal: "cc: Mrs. Milton Pollack").

[6] Some of Judge Pollack's sharp comments at the conference were a reaction to the conduct of the attorneys in raising the disqualification issue *ex parte* and without full investigation. Drexel's attorney – whose law firm was representing Drexel in the Palais Royal transaction and had had a copy of the Bain/Palais Royal contract since mid-August, see note 5, *supra* – acknowledged that he had not read the contract and still did not know precisely what it said. Pet. App. A78-A79; see also 9/13/88 Tr. 36. When Drexel's attorney stated that he had a "general understanding of who the parties are and what the obligation is" and referred to the limited basis for the information he had conveyed to Judge Pollack in the *ex parte* telephone call on Saturday, September 10 (Pet. App. A78), Judge Pollack said: "If you fellows had put that in an affidavit and come up on a Rule 11, you would have gotten whacked. You didn't make any investigation at all to find out what you were talking about before you approached a judge who was

c. One week later, after Judge Pollack denied requests by Drexel and petitioners to proceed with extensive discovery, they filed a motion requesting that Judge Pollack recuse himself because of his wife's interest in the Palais Royal transaction.[7] The motion was made chiefly under 28 U.S.C. 455(a), which provides: "Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

At the time the motion was filed, there was no contract between Bain and Drexel. There was, however, a draft understanding, under which it was contemplated that Drexel would assist Bain in obtaining financing, by underwriting debt and by making a bridge loan from its own capital, and would be entitled to buy a percentage of the holding company that was newly formed to purchase the Palais Royal business (Specialty Holdings, Inc., or SHI). See Pet. App. A7; Moseley & McCarthy Aff. ¶¶ 6-8, 11 (Sept. 20, 1988). Under the contract between Bain and Drexel that was ultimately executed on November 1, 1988, Drexel underwrote $277 million in high yield debt to finance the purchase of the two companies; because only $90.5 million of the debt had been placed by that date, Drexel also agreed to extend a bridge loan to Bain of $186.5 million of its own funds. Pet. 3; see Moseley Suppl. Decl. ¶¶ 3-7 (Nov. 10, 1988). In return for its services, Drexel received substantial fees and was enabled to pur-

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handling a lawsuit?" *Id.* at A79. The Judge also warned counsel that if they were to file a recusal motion "on the basis of insufficient information and failure to investigate and concealment of anything," they could anticipate his imposing appropriate sanctions on them. *Id.* at A81.

[7] That motion made no reference to the related private actions pending before Judge Pollack. It was not until a week later that petitioners and Drexel moved for Judge Pollack to disqualify himself from the private actions.

chase from Bain 8.5% of the equity in SHI, the newly formed purchasing company. See Pet. 3; Pet. App. A7, A47. Drexel's purchase of that stock, however, occurred after Mrs. Pollack and the other Palais Royal shareholders had become completely disassociated from Palais Royal; when they sold their stock to SHI, Bain was the sole owner of SHI. See *id.* at A7, A46.

d. On October 17, 1988, Judge Pollack denied the recusal motion, concluding that there was "no reasonable basis for doubting the Court's impartiality in this case by reason of the Palais Royal stock sale." Pet. App. A47. Judge Pollack found that Mrs. Pollack would be receiving no money from Drexel; that the only contract the selling shareholders had was with Bain (and with SHI, which was then a wholly owned subsidiary of Bain); that the Palais Royal shareholders had been excluded by Bain from any participation in dealings with prospective lenders, including Drexel; and that the selection of Drexel was to be "the unrestricted and voluntary choice to be made by Bain with which Palais Royal and its stockholders have nothing to say and no concern." *Id.* at A46-A47.[8]

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[8] On October 10, 1988, prompted by the relationship between the Paul Weiss tax attorneys and the Palais Royal shareholders (see note 5, *supra*), Judge Pollack issued a show cause order against Paul Weiss and the individual attorneys in the firm representing Michael Milken. Stating that it appeared that the lawyers and firm "may have participated herein on the pending motions for recusal of the Court adversely to PALAIS ROYAL and its STOCKHOLDERS, WITH KNOWLEDGE, actual and imputed, of the confidential business [information]," the order directed the lawyers and firm to show cause why an investigation and hearing should not be held to determine (i) "whether [they] are proceeding herein in breach of fiduciary duties and obligations and with professionally conflicting interests in the pending matter seeking disqualification of the Court pursuant to 28 U.S.C. § [455] in respect to the interest of Palais Royal and its stockholders" and (ii) whether, if so, they should be required to withdraw

3. a. Petitioners, Drexel, and Maultasch thereupon filed a petition for a writ of mandamus in the court of appeals, asking that court to direct Judge Pollack to recuse himself. In a divided decision, the court denied the requested relief. Pet. App. A1-A22.

The court stated its belief that, "in light of the facts and circumstances that are known, a reasonable person would not conclude that the judge's impartiality could reasonably be questioned under § 455(a)." Pet. App. A20. The court added that its conclusion was "reinforced because of the particular procedural posture in which this case is before us as a petition for a writ of mandamus." *Ibid.* The court stated that "the exceptional remedy of mandamus will only be invoked where the petitioner has demonstrated that its right to such relief is 'clear and *indisputable.*' " *Id.* at A11 (quoting *Moses H. Cone Memorial Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 18 (1983), and *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 35 (1980)). If such a strict standard were not required, the court reasoned, mandamus challenges to a trial judge's refusal to disqualify himself "would become an effective tactic for harassment and delay." Pet. App. A11. In this case, the court concluded, the petitioners had "failed to establish the necessary clear and indisputable right to that extraordinary writ." *Id.* at A20.[9]

In assessing whether Judge Pollack's recusal was required under Section 455(a), the court of appeals applied an "objective [test that] assumes that a reasonable person

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the recusal motion. Pet. App. A54-A55. The next day, Judge Pollack, without proceeding further, referred the matter to the Chief Judge of the District Court. *Id.* at A71-A72.

[9] The court of appeals also rejected the claims that disqualification was required under 28 U.S.C. 455(b)(1) and (4). Pet. App. A21-A22. Those claims, as to which there was no dissent in the court of appeals, are not renewed in this Court.

*knows and understands all the relevant facts.*" Pet. App. A13. Given the facts of this case, the court found no basis for recusal: "Mrs. Pollack has had no business or other dealings with Drexel; she will receive no money from Drexel; and Drexel is not essential to the completion or success of the transaction. Moreover, there is no nexus, direct, indirect or otherwise, between the civil suits pending before Judge Pollack and Mrs. Pollack's interest in Palais Royal." *Id.* at A17.[10] The court concluded that the connection between Drexel and Judge Pollack was too remote, because "Drexel has no obligation direct or indirect to Mrs. Pollack," adding that the theory underlying the disqualification motion here "would mean that any remote connection even, for example, to investors who buy SHI bonds from Drexel would mandate recusal." *Id.* at A17-A18.

The court then discussed the assertions supporting the claim that Drexel's recusal motion was untimely and that the motion represented "an attempt by Drexel to manipulate the judicial process through judge-shopping." Pet. App. A18. The court did so, it explained, because "a reasonable person knowing all the facts and circumstances should consider [such assertions] in order to decide whether the failure to recuse was an abuse of sound judicial discretion." *Id.* at A18, A20. The court noted, however, that those assertions were not established facts. *Ibid.* "Consequently," the court stated, "our decision does not turn on these assertions." *Id.* at A20.

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[10] In observing that Drexel was not essential to the transaction, the court of appeals, like the district court (Pet. App. A47-A48), relied on an affidavit by investment banker Lewis L. Glucksman, former head of Lehman Brothers Kuhn Loeb, stating that, based on Drexel's own analysis of the transaction, "a number of major investment banking firms could handle the placing of Bain's notes on terms comparable to those offered by Drexel." Pet. App. A17. See *id.* at A6.

b. Judge Lumbard dissented on the ground that Section 455(a) required disqualification. Pet. App. A22-A32. For him, "the inescapable relevant fact [was] that Drexel has been, and is now, retained by the firm which is under contract with Mrs. Pollack and members of her family to arrange financing for the cash purchase of Palais Royal, their family business, from which members of the family will receive over $84 million and Mrs. Pollack herself, and as trustee, will receive $30 million in cash." *Id.* at A23. Judge Lumbard concluded "that a reasonable person knowing these ultimate conceded facts would reasonably question Judge Pollack's ability to supervise such litigation impartially." *Ibid.*[11]

c. The court of appeals denied rehearing en banc. Four judges in the majority joined in an opinion that stressed the presence in the case of a judge-shopping issue, Drexel's formal undertaking of its financing obligation *after* the present suit was filed, and the high standard for mandamus relief, requiring a showing of a "clear and indisputable right." Pet. App. A34-A37.[12] The same four judges also joined a second opinion that, in addition to explaining that the panel had merely "applied well-settled rules to the specific facts of this case" (*id.* at A38), con-

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[11] Judge Lumbard rejected the court's reliance on the absence of a connection between Drexel and Mrs. Pollack, stating that such reliance "exalt[ed] the form of the transaction over its substance" and that "it most certainly is the public perception that Mrs. Pollack is to be paid $30 million thanks to Drexel." Pet. App. A27, A28. In the circumstances, Judge Lumbard added, it was "irrelevant" that "there might have been others who would be interested in working on the deal." *Id.* at A28.

Judge Lumbard also stated his view that Judge Pollack's negative reaction to the recusal motion, including his show cause order, confirmed what he believed would be the reasonable person's doubts about Judge Pollack's ability to "act impartially in these cases." Pet. App. A23, A26-A27.

[12] That opinion also explained that Judge Pollack's issuance of the show cause order, while troublesome, did not require disqualification,

cluded that recusal was not required because the " 'flow' " of money "to Mrs. Pollack from Drexel * * * was much too indirect and circuitous a movement to lead reasonable, objective and impartial observers" to question Judge Pollack's impartiality (*id.* at A39). *Id.* at A37-A40.[13] The four dissenting judges pointed to two circumstances: Drexel's provision of financing for a transaction in which Mrs. Pollack received approximately $30 million (the transaction had by this time been completed); and Judge Pollack's referral of misconduct charges based on counsel's alleged breach of confidence owed to Mrs. Pollack. *Id.* at A40-A44.[14]

4. At petitioners' request, the court of appeals subsequently stayed the issuance of its mandate for 30 days. Pet. App. A51. Because the present petition was filed within that time, the stay continues in effect pending this Court's disposition of the petition. Fed. R. App. P. 41(b). As a result, there remains in place a stay of district court proceedings that had been entered on October 20, 1988. Pet. App. A53.

On April 14, 1989, shortly after petitioners filed their petition for a writ of certiorari, Drexel and Maultasch entered into comprehensive settlements with the Commission. Under the settlements, Drexel and Maultasch would

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because the order was directed only at counsel and not at the parties, and because another judge would hear the matter. Pet. App. A36-A37.

[13] The opinion states: "the panel has ruled on all the significant issues pertaining to recusal that have been raised up to this point. Its conclusions merely were 'reinforced' by the stringent requirements for success on a mandamus petition." Pet. App. A40.

[14] The dissenters also stated that the recusal question would remain available for plenary review on direct appeal, because the panel had decided the recusal question only under special mandamus standards. Pet. App. A42. Moreover, they urged Judge Pollack to reconsider his decision in light, inter alia, of the details of the now-completed transaction and of the impending settlement between the SEC and Drexel. *Id.* at A43.

be permanently enjoined from violating the federal securities laws, and far-reaching relief would be provided to investors. The settlement with Drexel would require the company to install new personnel and management practices, to institute internal and external monitoring to prevent future violations of the securities laws, to cooperate with the Commission's continuing investigation, and to pay $350 million into a civil disgorgement fund to compensate persons with valid claims against Drexel for securities law violations.[15] In addition, pursuant to an agreement between Drexel and the United States Attorney for the Southern District of New York, the entry of a consent judgment with the Commission in the present matter is a precondition to resolving related criminal charges against Drexel. Under the criminal settlement, Drexel would enter guilty pleas to six counts charging securities and mail fraud and would pay an additional $300 million in penalties.

Under the court of appeals' stay of district court proceedings, the proposed consent decree could not be approved and entered by the district court. Accordingly, the day agreement was reached on the civil settlements, the Commission, Drexel, and Maultasch jointly asked the court of appeals to modify its stay of the district court proceedings for the purpose of allowing the district court to consider and, if appropriate, to enter and administer the proposed final judgments. The motion asked that Judge Pollack be permitted to enter and administer the settlements or, if that request were denied, that another district judge be allowed to do so pending disposition of the certiorari petition. In support of the motion, the Com-

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[15] The settlement with Maultasch would bar him from the securities industry and require him to cooperate with the Commission's investigation.

mission's Director of Enforcement stated that prompt implementation of the proposed consent decree was essential "to protect the investing public from repetition of the conduct alleged in the Commission's complaint and to help ensure that Drexel will comply with the federal securities laws in the future." Lynch Aff. ¶ 3, (Apr. 13, 1989). Similarly, the Assistant United States Attorney handling the criminal charges against Drexel stated that a delay in entry of the final judgment against Drexel would produce a concomitant delay in entry of Drexel's guilty pleas to the criminal charges, which not only would postpone Drexel's cooperation in the continuing criminal investigation but also would mean that very soon the five-year federal statute of limitations would begin to bar prosecutions of certain persons and offenses involved in the investigation. Baird Aff. ¶¶ 3, 4 (Mar. 2, 1989).

On April 19, 1989, the court of appeals denied the joint motion, stating that its stay of the mandate would "remain in effect until the Supreme Court disposes of the case." The Commission and Drexel thereafter jointly asked the court to clarify whether, pending this Court's action, a judge other than Judge Pollack might be assigned to enter and administer the final judgment against Drexel. On April 26, 1989, the court adhered to its prior ruling, stating: "A decision to assign the case, or any part of it, to another judge rests with Judge Pollack or with those responsible for the assignment of cases in the United States District Court for the Southern District of New York * * *. That decision does not rest with us." App. A, *infra*. On April 27, 1989, the Commission and Drexel asked Chief Judge Brieant of the Southern District of New York to assign another judge to enter and administer the judgments. On May 4, 1989, the Assignment Committee of the Southern District denied the request. App. B, *infra*.

## ARGUMENT

The court of appeals' decision rests on legal principles that are consistent with 28 U.S.C. 455(a), with this Court's recent decision in *Liljeberg* v. *Health Services Acquisition Corp.*, 108 S. Ct. 2194 (1988), and with well-established standards for mandamus relief. No other court of appeals has repudiated those principles. Petitioners' challenge to the court of appeals' decision is, at bottom, simply a disagreement with the court's application of those principles to the particular facts presented here. That fact-specific complaint does not call for this Court's review.

1. Petitioners contend (Pet. 9-14) that the decision of the court of appeals misconstrues the standards for applying 28 U.S.C. 455(a), is inconsistent with this Court's decision in *Liljeberg*, and conflicts with the decisions of other courts of appeals. Those contentions are incorrect.

a. Petitioners first attempt to find an important legal issue in the court of appeals' decision by suggesting (Pet. 9) that the decision "focuses on the perceptions of a super-sophisticated person who is presumed to know and understand all financial and legal nuances—including the hoary doctrine of contractual privity." That suggestion mischaracterizes the court's analysis. The court ruled against petitioners because it concluded that a reasonable person, knowing all of the objectively ascertainable facts, would not question Judge Pollack's impartiality. Thus, the court, in explaining the standards to be applied, stated that the test under Section 455(a) "is an objective one which assumes that a reasonable person *knows and understands all the relevant facts.*" Pet. App. A13. And in applying Section 455(a) to the facts here, the court in no way departed from the fully informed, reasonable person inquiry. *Id.* at A17-A20. Contrary to petitioners' sugges-

tion, at no point did the court adopt a "purely legalistic perspective."[16]

The approach taken by the court of appeals is correct. Congress intended that Section 455(a) be applied by asking the question put by the court of appeals—what would a reasonable, fully informed person think about the judge's impartiality? See *ibid.*; H.R. Rep. No. 1453, 93d Cong., 2d Sess. 5 (1974); S. Rep. No. 419, 93d Cong., 1st Sess. 5 (1973). This Court in *Liljeberg* applied the same standard. The Court affirmed the court of appeals' ruling that "a reasonable person, knowing the relevant facts" (108 S. Ct. at 2197) would question the judge's impartiality; and the Court came to the conclusion that a violation had occurred, and that retroactive relief was required, based on an assessment of the objectively ascertainable facts on which a reasonable observer might base an assessment of the risks of judicial bias (see 108 S. Ct. at 2202, 2205-2206). Nothing in *Liljeberg* remotely suggests that disqualification might be required because an ill-informed lay person might suspect the worst of a judge.[17]

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[16] The court of appeals disagreed with Judge Lumbard's statement that recusal must not be judged " 'from a purely legalistic perspective.' " Pet. App. A14 (quoting *id.* at A28)). As the court's opinion makes perfectly clear, however, its disagreement was not a rejection of the fully informed, reasonable person standard. Rather, the court explained that what it understood Judge Lumbard to mean, and what it was rejecting, was the suggestion that recusal must be judged based on what a less-than-fully informed person would surmise about the judge's impartiality. "Like all legal issues, judges determine appearance of impropriety—not by considering what a straw poll of the only partly informed man-in-the-street would show—but by examining the record facts and the law, and then deciding whether a reasonable person knowing and understanding all the relevant facts would recuse the judge." *Ibid.*

[17] Of course, contrary to petitioners' suggestion (Pet. 13), the *Liljeberg* Court did not assume that the reasonable objective observer

b. Petitioners also err in arguing (Pet. 10-11) that the court of appeals' discussion of the possibility of judge-shopping by the defendants (Pet. App. A18-A20) creates a legal issue warranting this Court's review. As an initial matter, not even petitioners suggest that this issue meets the ordinary requirements for review of a legal question by this Court—*e.g.*, an intercircuit conflict, or an actual or likely impact on other cases. In any event, the court of appeals did not rest its decision on allegations of judge-shopping.[18] The court, after relying on the facts of the Palais Royal transaction and the remoteness of any connection between Drexel and Mrs. Pollack, carefully pointed out that it was discussing the allegations in order to fill in the background that the statutorily required objective observer would take into account in judging recusal (*ibid.*), and it expressly stated: "our decision does not turn on these assertions." *Id.* at A20.

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knew that the trial judge had in fact forgotten about his interest in the litigation. It is only the " 'objectively ascertainable' " (108 S. Ct. at 2202) facts that the statutorily required *observer* must assume in assessing the situation. As *Liljeberg* establishes, the appearance standard of Section 455(a) cannot depend on subjective facts about a judge's mental state. That hardly means, however, that disqualification can be based on less than complete knowledge of the objective facts.

For the same reason that petitioners are wrong in claiming that the court of appeals' approach conflicts with the approach taken in *Liljeberg*, petitioners' assertion that the decision below conflicts with decisions of other courts of appeals (Pet. 13-14) founders on their mischaracterization of the inquiry conducted by the court of appeals. Neither *In re Faulkner*, 856 F.2d 716 (5th Cir. 1988), nor *Parker* v. *Connors Steel Co.*, 855 F.2d 1510 (11th Cir. 1988), the decisions relied on by petitioners, suggests that the standard should be anything other than whether a reasonable, fully informed person would question a trial judge's impartiality.

[18] It is worth noting that the allegations are not, as petitioners suggest (Pet. i, 6, 11), "unsubstantiated." It is true that the courts below

Hence, petitioners are wrong in suggesting (Pet. 11) that the court's decision stands for the proposition that allegations of misconduct are to be "weigh[ed]" or "balanced against the appearance of judicial bias." Rather, as stated by Judge Pierce in explaining why en banc review was not warranted, the court's discussion of the misconduct allegations stands only for the proposition that such allegations are "a significant contextual matter" that "places upon this court the burden of scrutinizing with exceptional care the petitioners' efforts to have the district judge disqualified." Pet. App. A35. As so understood within the Second Circuit itself, the court's discussion is wholly unobjectionable and certainly not an issue for this Court's review.[19]

c. Petitioners further argue (Pet. 11-13) that this Court's review is demanded because the decision below conflicts with the Court's decision in *Liljeberg*. But, as we

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did not make a finding on the general question whether petitioners and the Drexel defendants engaged in "judge-shopping." But, as shown above, the factual basis for the allegations, as set forth by the court of appeals (Pet. App. A18-A20), is largely undisputed.

[19] The Committee Reports accompanying the 1974 amendments to Section 455 explain:

> [I]n assessing the reasonableness of a challenge to his impartiality, each judge must be alert to avoid the possibility that those who would question his impartiality are, in fact, seeking to avoid the consequences of his expected adverse decision. Disqualification for lack of impartiality must have a *reasonable* basis. Nothing in this proposed legislation should be read to warrant the transformation of a litigant's fear that a judge may decide a question against him into a "reasonable fear" that the judge will not be impartial. Litigants ought not to have to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choice.

H.R. Rep. No. 1453, 93d Cong., 2d Sess. 5 (1974); S. Rep. No. 419, 93d Cong., 1st Sess. 5 (1973).

have already explained, the court of appeals in no way departed from the legal standards elaborated in *Liljeberg*. Nor does this case involve any question of the trial judge's subjective awareness of a disqualifying circumstance or, indeed, of the proper remedy for an adjudicated violation—the two issues that were presented in *Liljeberg*.

Moreover, the facts involved in *Liljeberg* are markedly different from those presented here. Notably, in *Liljeberg*, once the trial judge's subjective state of mind was ruled irrelevant, the case (from the outside observer's standpoint) involved a judge with a direct financial interest (as a fiduciary) in the dispute that was the subject of the litigation, in violation of Section 455(b)(4). See 108 S. Ct. at 2206. By contrast, petitioners do not even contend in this Court that Judge Pollack actually has an interest in the outcome of the present case or that this Court should find that disqualification is required except under Section 455(a)'s appearance test.

The disputed issue in the present case (putting aside the question of standards for mandamus relief) is whether there was a sufficient connection between Drexel and Mrs. Pollack through the Palais Royal transaction so as to create a disqualifying appearance of partiality. At bottom, petitioners ask this Court to grant their petition simply to disagree with the court of appeals' and district court's narrow, fact-dependent answer to that question. Because there was no privity or other legal relationship beween Drexel and Mrs. Pollack, the question whether their connection called for recusal presented no occasion for application of a bright-line rule, but was a question of degree. The court of appeals concluded that the connection was too remote, explaining that Mrs. Pollack had no interest in who Bain selected to provide it with financing and that Drexel was not indispensable to the transaction.

Pet. App. A17. That conclusion, which was examined with evident care by the full Second Circuit, does not warrant this Court's review.

2. Petitioners seek this Court's review of the standards for mandamus review of a trial judge's denial of a disqualification motion. Pet. 15-20. They argue that the court of appeals erred, and departed from the standards applied by three other courts of appeals, in requiring petitioners to demonstrate a clear and undisputable right to disqualification of the trial judge in order to justify the granting of their mandamus petition. This contention is incorrect and does not merit this Court's review.

To begin with, it is not clear that the mandamus standard made a difference to the court of appeals' decision in this case. Thus, while the court of appeals stated in its analysis that it must apply the special mandamus standard (Pet. App. A10-A12), in its conclusion the court simply stated that recusal was not warranted by the facts of this case, adding that the conclusion was "reinforced" by the procedural posture of the case (*id.* at A20).[20] Similarly, because of the distinctive character of the judgment required under Section 455(a)—a highly fact-specific judgment about how an objective observer might view the situation—it is hardly clear to what extent the special "clear and indisputable right" standard for mandamus relief actually makes a difference to the outcome of disqualification cases in general. Petitioners' challenge to the proper standard for such relief, therefore, has an abstract quality that counsels against this Court's review.

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[20] As noted above, the opinions on denial of rehearing en banc took somewhat different views of whether the court of appeals settled the recusal question as it would be presented without the special mandamus standard. Compare Pet. App. A40 with *id.* at A42.

In any event, the court of appeals' decision correctly follows well-established mandamus principles and precedent. Based on the longstanding congressional policy against piecemeal litigation, it is well established that mandamus relief is generally not available unless the petitioner demonstrates a clear and indisputable right to the relief sought. As this Court has explained on several occasions,

> it is in the interest of the fair and prompt administration of justice to discourage piecemeal litigation. It has been Congress' determination since the Judiciary Act of 1789 that as a general rule appellate review should be postponed * * * until after final judgment has been rendered by the trial court. A judicial readiness to issue the writ of mandamus in anything less than an extraordinary situation would run the real risk of defeating the very policies sought to be furthered by that judgment of Congress.

*Kerr* v. *United States Dist. Court*, 426 U.S. 394, 403 (1976) (citations omitted). Accord *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 35 (1980) (per curiam). Thus, as the Court reaffirmed most recently in *Mallard* v. *United States Dist. Court*, No. 87-1490 (May 1, 1989), slip op. 12, mandamus petitioners must "carry 'the burden of showing that [their] right to issuance of the writ is "clear and indisputable." ' " See also *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 108 S. Ct. 1133, 1143 (1988); *Moses H. Cone Memorial Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. at 6; *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. at 35; *Will* v. *Calvert Fire Insurance Co.*, 437 U.S. 655, 662 (1978); *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 384 (1953); *United States* v. *Duell*, 172 U.S. 576, 582 (1899).

It is not disputed in this case that interlocutory mandamus relief may be available in proper circumstances in

judicial disqualification cases.[21] And petitioners offer no good reason for departing from the ordinary mandamus standard for judicial disqualification cases. All of their

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[21] This Court has not directly ruled on that question. In *Ex parte American Steel Barrel Co.*, 230 U.S. 35 (1913), the Court denied a request for mandamus ordering reinstatement of a trial judge without addressing the question, ruling that "[t]he writ of mandamus will be granted by this court only when it is clear and indisputable that there is no other legal remedy" and stating that review was possible "in due course of law," presumably on appeal from a final judgment. 230 U.S. at 45. In *Mallard*, the Court recently reiterated the general rule that mandamus petitioners "must show that they lack adequate alternative means to obtain the relief they seek." Slip op. 12.

Virtually every circuit has found mandamus to be an appropriate remedy for erroneous denial of recusal motions in proper circumstances. See *In re United States*, 666 F.2d 690 (1st Cir. 1981); *In re Beard*, 811 F.2d 818 (4th Cir. 1987); *In re Placid Oil Co.*, 802 F.2d 783 (5th Cir. 1986); *Pepsico, Inc.* v. *McMillen*, 764 F.2d 458 (7th Cir. 1985); *Scarrella* v. *Midwest Federal Savings & Loan*, 536 F.2d 1207 (8th Cir.), cert. denied, 429 U.S. 885 (1976); *In re Cement Antitrust Litig.*, 673 F.2d 1020 (9th Cir. 1982), aff'd, 459 U.S. 1190 (1983); *Bell* v. *Chandler*, 569 F.2d 556 (10th Cir. 1978). See also *United States* v. *0.21 Acres of Land*, 803 F.2d 620 (11th Cir. 1986); *Mitchell* v. *Sirica*, 502 F.2d 375 (D.C. Cir.), cert. denied, 418 U.S. 955 (1974); 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3553, at 660-661 (1984). But see *Pittsburgh* v. *Simmons*, 729 F.2d 953, 954 (3d Cir. 1984) ("A refusal to recuse is reviewable only after final judgment."); see also *Cleveland* v. *Krupansky*, 619 F.2d 576, 578 (6th Cir.), cert. denied, 449 U.S. 834 (1980) ("The order entered by a District Judge refusing to disqualify himself is not reviewable upon appeal until a final judgment has been entered in the case.").

This issue is not presented for review here. (Of course, if mandamus is not available, then the decision by the court of appeals to deny mandamus relief was correct.) We do not dispute the availability of mandamus relief in proper circumstances. Moreover, there is no doubt of the courts' *jurisdiction* to grant relief under 28 U.S.C. 1651; the conflict goes only to the proper occasions for its exercise. See *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 254-255 (1957).

arguments (Pet. 17-18) come down to the proposition that applying the ordinary mandamus standard may result in a trial being held whose outcome is eventually overturned on appeal. That, however, is the necessary consequence of the congressional policy disfavoring interlocutory appeals and does not distinguish disqualification motions from numerous other motions routinely made during and before trial. Indeed, this Court has noted—in discussing the possible harm caused by requiring a party to wait until final judgment before appealing an adverse ruling on a motion to disqualify counsel—that such harm "does not 'diffe[r] in any significant way from the harm resulting from other interlocutory orders that may be erroneous, such as orders requiring discovery over a work-product objection *or orders denying motions for recusal of the trial judge.*' " *Firestone Tire & Rubber Co.* v. *Risjord,* 449 U.S. 368, 378 (1981) (citation omitted; emphasis added).[22]

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[22] Petitioners are incorrect in their suggestion (Pet. 16-17) that the court of appeals' insistence on the " 'extraordinary' nature of mandamus relief" is inconsistent with the "even more 'extraordinary' procedural circumstances" that prompted this Court in *Liljeberg* to vacate the trial court's judgment pursuant to Fed. R. Civ. P. 60(b)(6). In fact, similar concerns underlie both the standard for mandamus relief and the requirements for relief under Rule 60(b)(6). Both Congress and this Court, in adopting Rule 60(b), made the determination that, under certain circumstances, the policy in favor of the finality of judgments should give way to other compelling concerns. With respect to Rule 60(b)(6), this Court requires a showing of "extraordinary circumstances" before relief may be granted. *Liljeberg,* 108 S. Ct. at 2204, citing *Klapprott* v. *United States,* 335 U.S. 601, 614-615 (1949), and *Ackermann* v. *United States,* 340 U.S. 193, 200 (1950). See also *Liljeberg,* 108 S. Ct. at 2209 (Rehnquist, J. dissenting) (requirement that relief will be granted under Rule 60(b)(6) only upon a showing of extraordinary circumstances "is essential if the finality of judgments is to be preserved"). Similarly, this Court's insistence that a writ of mandamus is an "extraordinary remedy" available only upon a showing of

Nothing in the legislative history of the 1974 amendments to Section 455 suggests any intention on the part of Congress to create a special category of interlocutory appellate review for recusal cases. To the contrary, permitting such review would undermine the balance Congress sought to achieve. Congress was concerned that the public should perceive the courts as being free of bias, but Congress was also concerned that spurious recusal motions would have a disruptive effect on the proper functioning of the judicial system and that use of the recusal statute for judge-shopping would in itself impair public confidence. See H.R. Rep. No. 1453, *supra*, at 5. As the court of appeals appropriately concluded, if a less rigorous standard were to be applied, "mandamus applications to review a judge's refusal to recuse would become an effective tactic for harassment and delay." Pet. App. A11. The ordinary standard requiring a clear and indisputable right to relief strikes the proper balance in the present setting as it does in other settings.

Finally, petitioners[x] contend (Pet. 18-20) that review is warranted because three circuits have rejected the "clear and indisputable right" standard for mandamus review of trial judges' denial of disqualification motions. To the contrary, two of the referenced circuits—the Fourth and Fifth—have in fact expressly required that a party seeking mandamus review of a district court's recusal decision must establish a "clear and indisputable" right to the requested relief. *In re Beard,* 811 F.2d 818, 826 (4th Cir. 1987); *In re Placid Oil Co.,* 802 F.2d 783, 786 (5th Cir.

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"clear and indisputable" entitlement to such relief is grounded in the policy that appellate review should be postponed until after the trial court renders its final judgment. See *Kerr* v. *United States Dist. Court,* 426 U.S. at 403; *Allied Chemical Corp.* v. *Daiflon, Inc.,* 449 U.S. at 35.

1986). And neither *In re Rodgers,* 537 F.2d 1196 (4th Cir. 1976), nor *In re Faulkner,* 856 F.2d 716 (5th Cir. 1988), which petitioners cite as examples of a "less stringent standard" (Pet. 19) in those circuits, enunciates any contrary standard for mandamus review.

In the Seventh Circuit, also asserted by petitioners to be in conflict with the Second Circuit here, the proper standard for mandamus review of disqualification denials simply has not been settled. To be sure, the Seventh Circuit has held that Section 455(a) rulings may be reviewed only by mandamus and not on direct appeal (*Durhan* v. *Neopolitan*, No. 88-2108 (Apr. 20, 1989), slip op. 12; *Union Carbide Corp.* v. *U.S. Cutting Service, Inc.*, 782 F.2d 710, 712-713 (1986); *United States* v. *Balistrieri,* 779 F.2d 1191, 1204-1205 (1985), cert. denied, 475 U.S. 1095 (1986)), and it has stated that it will "interpret generously our power to issue the writ [of mandamus]" in recusal cases (*Union Carbide Corp.*, 782 F.2d at 713). The Seventh Circuit has, however, never repudiated the "clear and indisputable right" standard for mandamus review in disqualification cases. Indeed, in *Union Carbide* itself, the court stated that mandamus would be denied in "routine" cases, and its statement about the "generous" interpretation of the mandamus power applies by its terms only to "serious" recusal questions. 782 F.2d at 712, 713. Moreover, in *United States* v. *Horak*, 833 F.2d 1235 (7th Cir. 1987), which was not itself a judicial recusal case, the court cited a judicial recusal mandamus case in affirming that mandamus is an " 'extraordinary remedy' " available only to a party that demonstrates a " 'clear and indisputable' " right to it. *Id.* at 1248-1249, citing *Pepsico, Inc.* v. *McMillen,* 764 F.2d at 458 (7th Cir. 1985) (not itself discussing standard for mandamus relief). In short, petitioners are wrong in asserting that there is a conflict over

mandamus standards in recusal cases between the Seventh and Second Circuits, let alone in implicitly suggesting that there is a conflict sufficiently concrete and developed to warrant this Court's review.[23]

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[23] Neither the Seventh Circuit nor any other circuit has suggested, as petitioners seem to urge (Pet. 15-18), that the standard for review on mandamus in recusal cases should be the same as the standard on appeal. Moreover, petitioners' suggestion (*id.* at 15-16) that "abuse of discretion" is not the proper standard for appellate review of judicial disqualification decisions is squarely contradicted by the legislative history of the 1974 amendments to Section 455:

> [T]he proposed legislation * * * is not designed to alter the standard of appellate review on disqualification issues. The issue of disqualification is a sensitive question of assessing all the facts and circumstances in order to determine whether the failure to disqualify was an abuse of sound judicial discretion.

H.R. Rep. No. 1453, *supra,* at 5; S. Rep. No. 419, *supra,* at 5. Petitioners' suggestion has also been rejected by every court of appeals that has addressed the issue. See, *e.g., United States* v. *Wilensky*, 757 F.2d 594, 599-600 (3d Cir. 1985); *Gilbert* v. *Little Rock,* 722 F.2d 1390, 1399 (8th Cir. 1983), cert. denied, 466 U.S. 972 (1984); *Phillips* v. *Joint Legislative Committee,* 637 F.2d 1014, 1021 (5th Cir. 1981), cert. denied, 456 U.S. 960, 456 U.S. 971 (1982); *Blizard* v. *Frechette*, 601 F.2d 1217, 1221 (1st Cir. 1979); *S.J. Groves & Sons Co.* v. *International Brotherhod of Teamsters, Local 627,* 581 F.2d 1241, 1248 (7th Cir. 1978).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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*Special Counsel*
*Securities and Exchange Commission*

MAY 1989

**APPENDIX A**

# UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 88-3060

IN RE DREXEL BURNHAM LAMBERT INCORPORATED, THE DREXEL BURNHAM LAMBERT GROUP INCORPORATED, MICHAEL R. MILKEN, LOWELL J. MILKEN, CARY J. MAULTASCH, AND PAMELA R. MONZERT,

PETITIONERS

[Filed Apr. 26, 1989]

We have been asked to reconsider or to clarify our order of April 19, 1989 denying a joint motion to modify the stay of the proceedings filed by Drexel Burnham Lambert Inc., The Drexel Burnham Lambert Group Inc. (collectively "Drexel"), the Securities and Exchange Commission ("The SEC") and Cary J. Maultasch.

It is HEREBY ORDERED that the order of April 19, 1989 remains in effect.

1. In their April 14 motion papers seeking modification of the stay, Drexel, the SEC and Maultasch requested that Judge Pollack be allowed to consider the settlement agreement Drexel and the SEC had reached, but stated that neither they nor the three individuals who have applied to the Supreme Court for a writ of certiorari—Michael Milken, Lowell Milken and Pamela Monzert ("the Milken group")—would object to the agreement being considered by another district judge. We denied the motion on the ground that in order to give meaning to the stay of the underlying proceedings, we are

obligated by Federal Rule of Appellate Procedure 41(b) to preserve the status quo with regard to the interests of the Milken group, which may be adversely affected by the settlement agreement.

2. In their motion for reconsideration and clarification, Drexel and the SEC note that our April 19 order made no reference to the possibility of another district judge considering the proposed settlement agreement. They argue that our stay in this case "is focused only on the ability of Judge Pollack to act in this case and should not prevent the parties from presenting [the proposed] settlement to another judge."

3. As Drexel itself, along with the SEC, stated in their April 14 motion papers, "[t]he Court's decision that Judge Pollack may continue to preside in this case is the law of the case." Judge Pollack is entitled to remain in this case, absent a Supreme Court ruling to the contrary, or new facts which would warrant his recusal. A decision to assign the case, or any part of it, to another judge rests with Judge Pollack or with those responsible for the assignment of cases in the United States District Court for the Southern District of New York in accordance with that court's rules regarding assignment of judges for the division of business. That decision does not rest with us.

4. Nor, as Drexel and the SEC seem to believe, does the decision rest with the parties in the case. The fact that the SEC has changed its position, and is now willing to accept another judge, does not mean that Judge Pollack may be bypassed. Consensus among the parties that they would prefer a different judge is not a sufficient reason for a reviewing court to oust a judge already assigned.

5. So long as Judge Pollack remains assigned to this case, we must accept his position as part of the status quo. It was in this context that we ruled earlier that the Milken

group has a right to have the Supreme Court determine whether Judge Pollack should remain in the case before he is allowed to consider a proposed settlement which may affect the interests of the Milken group. We adhere to that ruling.

/s/ J. Edward Lumbard
HONORABLE J. EDWARD LUMBARD

/s/ Richard J. Cardamone
HONORABLE RICHARD J. CARDAMONE

/s/ Lawrence W. Pierce
HONORABLE LAWRENCE W. PIERCE

*Circuit Judges.*

4/26/89
Date

*N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.*

**APPENDIX B**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

88 Civ. 6209-MP

SECURITIES AND EXCHANGE COMMISSION, PLAINTIFF

*v.*

DREXEL, BURNHAM, LAMBERT, INCORPORATED, ET AL., DEFENDANTS

**MEMORANDUM AND ORDER OF THE ASSIGNMENT COMMITTEE**

Plaintiff, together with defendants Drexel, Burnham, Lambert, Incorporated, and the Drexel Burnham Lambert Group, Inc. (collectively "Drexel"), have applied by written submission to the Court to reassign this action in part and temporarily for the purpose of permitting the Court to rule on two proposed consent judgments, one of which has been agreed to between the Commission and Drexel, and the other between the Commission and the defendant Maultasch. The thrust of the request is that this reassignment would apply solely for the purpose of having the consent judgments adjudicated by the Court, and administered under the supervision of a judicial officer during such time when Judge Milton Pollack of this Court, to whom this action has previously been assigned for all purposes, is stayed from participation by the Court of Appeals. That stay is based on the pendency of a petition for *certiorari*, described below, filed in the Supreme Court by other parties to this litigation. Such petition is not yet fully submitted for decision.

The Assignment Committee has convened and considered the written submissions herein, and has also communicated with the Honorable Milton Pollack. The docket of Judge Pollack is entirely current. He advises that he is ready, willing and able to entertain a joint application to have these judgments entered, and if approved, administered. He would act forthwith with respect thereto but for the stay presently in effect by the Court of Appeals of the Second Circuit, pending a petition for *certiorari* to the Supreme Court of the United States to obtain its review of an *en banc* decision of the Second Circuit declining to issue an order disqualifying Judge Pollack pursuant to 28 U.S.C. Section 455. The familiarity of the reader with all proceedings heretofore had herein is assumed.

The disqualification motion, with respect to which the Assignment Committee has no jurisdiction, was decided in the first instance by Judge Pollack in the regular course of this litigation in the District Court. The Court of Appeals declined to grant mandamus to compel a different result.

Judge Pollack has not requested of this Committee that all or any part of this action be assigned to another Judge, and gives us no present indication of intending to do so.

Our Court Rules for the Division of Business Among District Judges, familiarity with which is assumed, provide for an Individual Assignment System "to assure continuous and close judicial supervision of every case." The System is administered by the Assignment Committee acting pursuant to the Rules for the Division of Business and the statutory power of the District Court to provide for the division of its business pursuant to 28 U.S.C. Section 137. Under Rule 18 of those Rules, our Committee would be required to transfer this case by lot if Judge Pollack had granted the motion to disqualify him from presiding, or if

the Court of Appeals had made such a direction. Since Judge Pollack has not been disqualified and has made no request for a transfer, there can be no transfer under that Rule. Judge Pollack is still the Judge assigned to the case under our Rules.

The Court of Appeals stay, under Appellate Rule 41(b), is now in effect, solely pending the outcome of the attempt to obtain Supreme Court review. This is a stay not merely against Judge Pollack; but a stay of proceedings in the *District Court.* However, the SEC and Drexel now rely on language in an order of the Court of Appeals dated April 26, 1989 denying a motion to modify the stay:

> Judge Pollack is entitled to remain in this case, absent a Supreme Court ruling to the contrary, or new facts which would warrant his recusal. A decision to assign the case, or any part of it, to another judge rests with Judge Pollack or with those responsible for the assignment of cases in the United States District Court for the Southern District of New York in accordance with that court's rules regarding assignment of judges for the division of business. That decision does not rest with us.

It is now urged by the SEC and Drexel that the Assignment Committee should, in reliance on this language, reassign the case to another judge for the limited purpose of entering and administering the consent judgments.

It is also suggested that Judge Pollack is "unavailable" within the meaning of Rule 5, which provides that, where the assigned judge is "unavailable due to extraordinary circumstances", a matter relating to his case may be heard by the Part I judge. Judge Pollack is not unavailable in the sense intended by this Rule.

Provisions found in the aforementioned Rules for the reassignment of a case or cases, absent a request by or dis-

qualification of the assigned judge, are of limited scope. They are found only in Rule 19, which calls for reassignment by the Assignment Committee on its own initiative "in the case of death or resignation, in the event of prolonged illness, disability, unavoidable absence of an assigned judge, or the build-up of an excessive backlog." No such circumstance exists here.

Our scrupulous adherence to the Rules adopted by the Court is essential to the integrity of the Court. Such adherence serves to prevent manipulation in the assignment or reassignment of Judges.

Judge Pollack is the regularly assigned judge in this case. Judge Pollack has denied a contested application to remove him from the case, and his refusal to withdraw has been reviewed by the Court of Appeals. No circumstance has arisen which under our Rules for the Division of Business would make it appropriate to reassign the case or any part of it to another judge.

Problems arising during the course of, or as a result of the denial of a motion to disqualify an assigned judge, are properly dealt with by the normal and customary litigation process in the District Court and the higher courts. Accordingly, it seems inappropriate for the Assignment Committee to inject itself into, or serve as an alternative to, the litigation process. It would be particularly unwarranted in this case when the parties moving for the disqualification of Judge Pollack have so far failed to achieve that very same result, and the requested action is approval of an agreement which the Court of Appeals has determined may adversely affect other defendants in the case.

We find no basis to conclude from the submissions before us that such delay, which may result from awaiting action by the Supreme Court, will affect the public interest adversely.

We hereby direct that there shall be no reassignment of all or part of this case at this time, and that no application with respect thereto shall be entertained in Part I.

So Ordered.

Dated: May 4, 1989
New York, New York

For The Assignment Committee

Charles L. Brieant, Chief U.S.D.J.
Chairman

Thomas P. Griesa, U.S.D.J.,
Member

Louis L. Stanton, U.S.D.J.,
Member

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

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MICHAEL R. MILKEN, LOWELL J. MILKEN and PAMELA R. MONZERT,

*Petitioners,*

*v.*

SECURITIES AND EXCHANGE COMMISSION,

*Respondent.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

---

## MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE AND BRIEF OF THE *ARDEN WAY* PLAINTIFFS AS AMICI CURIAE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

---

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*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE

Plaintiffs in *Arden Way Associates, et al.* v. *Ivan F. Boesky, et al.* ("*Arden Way*")* , which action has been consolidated as part of *In re Ivan F. Boesky Securities Litigation,* MDL Dkt. No. 732, M21-45-MP, pending before the Honorable Milton Pollack, Senior United States District Judge for the

* The *Arden Way* plaintiffs are Arden Way Associates; Bankers Life and Casualty Company; Broad and K, a California Limited Partnership; CityFed Financial Corp.; Commercial Union Assurance Co. plc; Commercial Union Pensions Management, Ltd.; Joseph S. Dresner; Milton H. Dresner, as Trustee; First City Securities, Inc.; Frobar Investment Co.; Gemini Overseas Corporation; Heron Financial Corporation; The Home Insurance Company; Imperial Group Pension Trust Limited and Imperial Group Pension Investments Limited; Ellen Kislak, as Executrix for the Estate of Myron Kislak; Lewis E. Lehrman; Liberty Service Corporation; The Lincoln National Life Insurance Company; Eldon C. Mayer Jr.; Mercia Zurich A.G.; Lowell A. Mintz; M.J. Corporation; National Can Corporation; Northern Trust Company, as Trustee; Overbrook Nominees, Ltd.; Pantherhouse Investments N.V.; Parliament C.V.; Martin Peretz; Peretz Family Investments; Pentagram Partners;

(footnote continued on next page)

Southern District of New York, hereby respectfully move, pursuant to Rules 36.3 and 42 of the Rules of this Court, for leave to file the accompanying brief as amici curiae in opposition to the petition for certiorari. Respondent has consented to the *Arden Way* plaintiffs' participation, but Petitioners have withheld consent.

The *Arden Way* plaintiffs have a strong interest in opposing the petition for certiorari. Judge Pollack has actively presided over *Arden Way* and related cases for more than two years, commencing well before the events contrived to claim his disqualification. Judge Pollack is intimately acquainted with the issues in these actions, having entered numerous orders and opinions. The cases, including *Arden Way*, have suffered by the delay resulting from the proceedings to disqualify Judge Pollack. The substitution of a new judge would only result in more delay. An amici brief on behalf of the *Arden Way* plaintiffs is desirable to highlight these concerns and give a voice to the civil litigants who have been adversely affected by the delay occasioned by the Petitioners' and others' disqualification efforts.

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(footnote continued from preceding page)

Jeffry Picower; Mark S. Ptashne; Rapid-American Corporation; Rhinelander N.V.; J. Henry Schroder & Co. A.G. Vaduz; Schroders Incorporated; State Street Bank and Trust Company, as Trustee; Strand Nominees, Ltd.; United Shelters, Inc.; William T. Ward; Water Authorities Superannuation Fund; and Zanar Investments, Inc.

For these reasons, the *Arden Way* plaintiffs respectfully request leave to participate as amici curiae in opposition to the petition for a writ of certiorari.

Respectfully submitted,

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May 5, 1989

## QUESTIONS PRESENTED

I. Should this Court engage in fact finding when the facts, as determined by the two courts below, are not clearly erroneous?

II. Should the recognized standard for invoking the exceptional remedy of mandamus only upon a showing of a clear and indisputable right to such relief be eroded on review of a claimed wrongful refusal to recuse, thus opening the door to piecemeal appeals and providing litigants with another weapon for delay and harassment?

III. Does application of the objective standard when determining whether a Judge's "impartiality might reasonably be questioned" under 28 U.S.C. § 455(a) require the court to assume that a reasonable person has knowledge of all facts and circumstances, or must the court ignore certain facts as being beyond the ken of the ordinary person?

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---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

---

## BRIEF OF THE *ARDEN WAY* PLAINTIFFS AS AMICI CURIAE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

---

### STATEMENT OF INTEREST

As explained in the foregoing motion, amici have a direct and substantial interest in the outcome of this case.

The *Arden Way* action, commenced in March 1987 and assigned to Judge Pollack, alleges, *inter alia*, injury as the result of federal securities law violations by Ivan Boesky and others, including Drexel Burnham Lambert Incorporated

("Drexel").[1] The Securities and Exchange Commission ("SEC") commenced the instant action against Michael R. Milken, Lowell J. Milken and Pamela R. Monzert (collectively, "Petitioners"), Drexel and others on September 7, 1988 (the "*SEC* action"). The *SEC* action alleges that Drexel, Petitioners, and others violated the federal securities laws, including a violation committed upon the *Arden Way* plaintiffs. Upon its filing, the *SEC* action was designated as a related case to *Arden Way* since they involved common issues of law and fact and was assigned to Judge Pollack. Subsequently, Judge Pollack directed that the *SEC* action and *Arden Way* be coordinated for pre-trial proceedings.

Because of the efforts to disqualify Judge Pollack in the *SEC* action, *Arden Way* has been subject to interminable delay. The substitution of a new judge in these proceedings is unwarranted and would result in further delay of *Arden Way* and related civil cases. In order to protect the *Arden Way* plaintiffs' and other civil litigants' interests in a timely disposition of their claims, amici seek to participate in these proceedings.

## STATEMENT OF THE CASE

In June 1988, stockholders of Palais Royal Inc. ("Palais Royal"), a closely held corporation, entered into a contract with Bain Venture Capital ("Bain") for the sale of their stock to Bain. The Palais Royal stockholders included Mrs. Moselle Pollack (Judge Pollack's wife) and members of her family. Bain planned to carry out the transaction through Specialty Holdings Inc. ("SHI"), a wholly owned subsidiary. The transaction was an all cash deal and was contingent upon Bain's (SHI's) obtaining the necessary financing for the purchase. Bain (SHI) agreed to use its best efforts to obtain financing on "terms reasonably satisfactory to [Bain]." (A6).[2] The financing

---

[1] Petitioners, employees of Drexel, are not defendants in *Arden Way*. On March 20, 1989, prior to the filing of the instant petition, the *Arden Way* plaintiffs served and filed a motion to amend their complaint to, *inter alia*, assert claims against Petitioners Michael R. Milken and Lowell J. Milken.

[2] Citations styled "A____" are to the Appendix to petition for a writ of certiorari.

was Bain's (SHI's) exclusive responsibility, and, at Bain's (SHI's) request, none of the selling stockholders had any contact with potential lenders. (A6).

Subsequently, Bain (SHI) entered discussions with Drexel to obtain financing for Bain's (SHI's) purchase of the Palais Royal stock. (A35).[3] There was never any evidence that Petitioners, employees of Drexel, had any personal interest or participation in the proposed financing by Drexel for Bain (SHI). The evidence below established that, since the transaction was not a difficult one to finance and several investment banking firms could provide financing on terms competitive with those offered by Drexel, the transaction could be successfully financed regardless of Drexel's participation. (A6-7. *See also* A47-48).

Drexel engaged in a course of conduct with respect to providing Bain (SHI) with funding with full knowledge that the *Arden Way* action and related cases were assigned to Judge Pollack. (A35. *See also* A7-8). In addition, at the time Drexel raised the issue of Judge Pollack's disqualification, Drexel was not committed to provide the financing to Bain (SHI). (A7).[4] Yet, Drexel proceeded to commit to the transaction with Bain (SHI) with full knowledge of Judge Pollack's participation in these cases.

On Saturday, September 10, 1988, Drexel's counsel telephoned Judge Pollack *ex parte* to notify him of the alleged potential conflict resulting from Drexel's discussions with Bain (SHI) regarding the possibility of Drexel's providing financing to Bain (SHI) to buy the Palais Royal stock. At a hearing held September 13, the matter was discussed by the court with counsel for the SEC and Drexel. On September 20, Drexel, joined by Petitioners, employees of Drexel, filed a motion to disqualify Judge Pollack in the *SEC* action. Then and since

---

[3] Prior to the filing of the within petition, the transaction between Bain (SHI) and Palais Royal stockholders closed. Even after the transaction closed, Drexel publicly stated that it only acted as financial adviser to Bain (SHI). *See* Wall St. J., Jan. 6, 1989, at C12, col. 1.

[4] Drexel did not commit to its transaction with Bain until November 1988.

then, in pursuing Judge Pollack's recusal, Petitioners have relied only on the grounds asserted by Drexel and have alleged no independent reason for recusal related to their status as Drexel employees.

Subsequently the recusal motion was broadened to encompass the other Drexel related actions pending before Judge Pollack, including *Arden Way*. Arguments on the motions were scheduled for October 11. (A9). On September 30, Drexel and Petitioners filed a petition for a writ of mandamus with the Second Circuit Court of Appeals seeking Judge Pollack's recusal in the *SEC* action. The Second Circuit denied the application as premature, and the hearing before Judge Pollack proceeded on October 11. (A9).

On October 17, Judge Pollack denied the recusal motion. Judge Pollack reviewed the entire record and found that Drexel had no financial or business connection, or other relationship, with Mrs. Pollack. (A46). As required, Judge Pollack posited " 'whether a reasonable member of the public at large, aware of all the facts, might fairly question the court's impartiality' " (A49), and concluded that the sale of Palais Royal stock to Bain (SHI) provided no reasonable basis for doubting the court's impartiality. In summary, Judge Pollack stated:

> This court can confidently respond, unhesitatingly, that under all the actual facts and circumstances herein, it has no doubt that a reasonable person, a member of the public, would fail to perceive even the slightest doubt of the appearance of the Judge's impartiality.

(A49).

Drexel, joined by its employee-Petitioners, again petitioned the Second Circuit for a writ of mandamus. On November 15, 1988, the Second Circuit denied the petition. The Second Circuit found that, under 28 U.S.C. § 455(a), "the test to be applied is an objective one which assumes that a reasonable person *knows and understands all the relevant facts.*" (A13) (emphasis in original) (citations omitted). The Second Circuit

disagreed with the dissent's implication that a reasonable person would be incapable of understanding the nature of the relationships among the parties. The determination under § 455(a), said the Second Circuit, is made "not by considering what a straw poll of the only partly informed man-in-the-street would show," but by deciding "whether a reasonable person knowing and understanding all the relevant facts" would perceive impropriety on behalf of the judicial officer. (A14).

The Second Circuit stated the relevant facts:

> Petitioners charge that because Mrs. Pollack is obtaining $30 million for the sale of her stock in Palais Royal there has been created an appearance of impropriety that requires Judge Pollack's recusal. The charge is based on the two premises: that Drexel's money will be paid to Mrs. Pollack and that Drexel is indispensable to the transaction. Neither statement is true. Mrs. Pollack has had no business or other dealings with Drexel; she will receive no money from Drexel; and Drexel is not essential to the completion or success of the transaction. Moreover, there is no nexus, direct, indirect or otherwise, between the civil suits pending before Judge Pollack and Mrs. Pollack's interest in Palais Royal.
>
> Instead, the relevant facts are that Drexel has a potential commitment to Bain or SHI, *not* to Palais Royal or to Mrs. Pollack. If Drexel performs its role, the funds will belong to Bain and *not* to Palais Royal; if Drexel fails to perform for Bain or SHI, some other financial institution is likely to because it is a profitable opportunity.

(A17) (emphasis in original).

The Second Circuit concluded that Judge Pollack's connection to Drexel would be perceived by the reasonable person as too remote to raise the specter of partiality. Accordingly, after noting that the exceptional remedy of mandamus could only be invoked upon a clear and indisputable right to such relief, the Court of Appeals resolved the facts, found that no reasonable person would doubt Judge Pollack's impartiality and,

consequently, denied the petition for writ of mandamus. (A17, A20).[5]

On February 21, 1989, the Second Circuit denied a petition for rehearing and suggestion for rehearing in banc, filed by Drexel and Petitioners. Judge Miner, joined by Judges Meskill, Cardamone and Pierce, concurred in the denial of rehearing in banc, and concluded that the panel majority properly reviewed the question of whether Judge Pollack's impartiality might reasonably be questioned in accordance with the "objective observer" standard mandated by this Court. (A38). After reviewing the facts surrounding the sale of Palais Royal stock by Mrs. Pollack (as those facts were found by the District Court and the Second Circuit), Judge Miner found it "quite unexceptional to draw from these findings an objective conclusion that no appearance of partiality would be provided by Judge Pollack's continued service in the actions against Drexel." (A38). Judge Miner found that the Second Circuit's "conclusions merely were 'reinforced' by the stringent requirements for success on a mandamus petition." (A40).

On April 5, 1989, Petitioners filed their petition for a writ of certiorari. Subsequently, on April 13, 1989, Drexel entered into a Consent and Undertakings ("Consent") in the *SEC* action. (B1-3).[6] Drexel, according to the Consent, has agreed to discontinue any efforts to remove Judge Pollack from presiding over the *SEC* action and related litigations, including *Arden Way*. (B2-3). Petitioners, employees of Drexel who never had any personal interest or participation in the Drexel financing asserted as a basis for recusal, now improperly pursue recusal of a judge which Drexel no longer seeks. When the final judgment is entered against Drexel in the *SEC* action, Drexel will no longer be a party in that case.

---

[5] The Second Circuit noted that a reasonable person knowing all the facts and circumstances would take into consideration the sworn assertions claiming an attempt by Drexel to manipulate the judicial process through judge-shopping. (A18). The court stated, however, that "[t]hese assertions are not established facts upon which decision may rest" and, thus, the "decision does not turn on these assertions." (A18, A20).

[6] Citations styled "B____" are to the Appendix to this brief.

## REASONS FOR DENYING THE WRIT

The Petition contains a non-conflict with respect to a non-consequential issue of law. Petitioners contend that the Second Circuit applied "erroneous" and "unprecedented" legal theories in this case. (Pet. 8).[7] Specifically, they argue that the mandamus standard applied by the Second Circuit was "incorrect and unworkable", and that the Second Circuit, in interpreting and applying § 455(a), adopted a "subjective" disqualification standard that shows "contempt for perceptions of the average members of the public." (Pet. 8, 9, 15).

Petitioners' arguments lack merit. *First*, Petitioners invite this Court to engage in unwarranted fact finding. *Second*, Petitioners ask this Court to create an exception to the well-settled standard for the issuance of a writ of mandamus. *Third*, Petitioners urge a bizarre formulation of the reasonable person test and mischaracterize the standard applied by the Second Circuit. In sum, the Second Circuit applied legal standards that comport with all relevant statutory and decisional law. The decision of the Second Circuit is not in conflict with any decision of this Court or of any federal appellate court.

### I. SINCE THE FACTS AS FOUND BY THE TWO COURTS BELOW ARE NOT CLEARLY ERRONEOUS, THIS COURT SHOULD DECLINE TO ENGAGE IN FACT FINDING.

#### A. This Court Has Established that It Will Engage in a Factual Review Only in Exceptional Cases.

Contrary to the settled rule of this Court, Petitioners invite this Court to review the facts as found by the two courts below and engage in its own fact finding. In order to do so, this Court:

> . . . would be forced to disregard this Court's repeated pronouncements that it "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."

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[7] Citations styled "Pet.____" are to the petition for a writ of certiorari.

*Berenyi* v. *Information Director*, 385 U.S. 630, 635 (1967) (*citing Graver Tank & Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949)). *See also NCAA* v. *Board of Regents of the University of Oklahoma*, 468 U.S. 85, 95 n.15 (1984); *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982).

Petitioners present no reason why this Court should deviate from its established rule in this case.

**B. The Facts as Found by the Two Courts Below Should Not Be Disturbed.**

The facts that control here are those found by the District Judge and affirmed by the Second Circuit. Arguments of the Petitioners premised on minority views (unsupported by the factual record or the findings below) have no force on this application.

One example of fundamental error of fact by the minority below, on which Petitioners depend, was reliance on the "assumption" that Drexel was inadvertently brought into the relationship with the spouse of the District Judge. That was clear error on the part of the minority. Further, the minority judge's statement of what he considered fundamental was expressed:

> To me, the inescapable relevant fact is that Drexel has been, and is now, retained by the firm which is under contract with Mrs. Pollack and members of her family.
>
> * * *
>
> Moreover, there is no evidence that Drexel is not committed to this transaction. Although the majority suggests that Drexel may not be contractually obligated to Bain, the evidence before us leads to the opposite conclusion.
>
> * * *
>
> [H]ypothesizing that a court conceivably might find Drexel uncommitted to Bain is to brush aside both the uncontroverted evidence and the reasonableness standard of Section 455(a). Drexel already has agreed to supply in excess of $200,000,000 . . . .

(A23-24). Nothing could be more erroneous.

On argument before the Second Circuit, Drexel's attorney was asked whether there was any such commitment. His response, as reported in the opinion for the Second Circuit, was that:

> Yet, even at the time of oral argument before us [on October 31, 1988], Drexel stated that though it was *still exploring the matter* and expected to participate, it still had no binding contractual obligation to act for Bain, *i.e.*, to obtain the financing to enable Bain to conclude the transaction.

(A7) (emphasis added). Indeed, it was not until the opinions in the Second Circuit were issued in November that Drexel committed to participate in providing financing to Bain (SHI).

The force of the incontrovertible facts completely negates the minority opinion. Since the established fact was that Drexel gave a commitment to Bain (SHI) only after Drexel began the pursuit of Judge Pollack's recusal, a reasonable person would have considered this as cogent evidence of the absence of any appearance affecting the Judge's impartiality. Certainly, Drexel could not claim that, having knowingly and intentionally attempted to create an appearance of lack of impartiality, it could then rely on it for recusal.

## II. THE SECOND CIRCUIT APPLIED THE CORRECT STANDARD FOR MANDAMUS REVIEW.

### A. The Second Circuit Applied the Correct Standard for Mandamus Review and This Court Should Not Create an Exception to That Standard.

This Court has established that the "remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Allied Chemical Corp.* v. *Daiflon Inc.*, 449 U.S. 33, 34 (1980). *See Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 382-85 (1953). Mandamus is an extraordinary remedy reserved for extraordinary circumstances. *Ex Parte Fahey*, 332 U.S. 258, 260 (1947). In light of the extraordinary nature of mandamus, a party seeking mandamus has the "burden of

showing that [his] right to issuance of the writ is 'clear and indisputable.' " *Kerr* v. *United States District Court*, 426 U.S. 394, 403 (1976) (*quoting Bankers Life*, 346 U.S. at 384).

The Second Circuit applied the above-stated standard for mandamus review in declining to issue a writ of mandamus directing recusal of Judge Pollack. (*See* A12). Petitioners do not directly attack the Second Circuit's application of the standard for mandamus review. Rather, Petitioners argue that the universal standard for mandamus review should be different in this case. They claim that a less strict standard for mandamus is necessary to encourage appeals of judicial disqualification issues before final judgment. (Pet. 17). Petitioners also maintain that their proposed mandamus standard will prevent "the unnecessary expenditure of considerable judicial and private resources . . . ." (Pet. 17). This Court has previously considered and rejected similar arguments.

A strict standard for mandamus review is necessary in order to discourage piecemeal appeals. *Kerr*, 426 U.S. at 403. In an era of crowded dockets, it is in the interest of the fair and prompt administration of justice not to countenance policies that undermine efficient judicial review. *See id.* As this Court has stated:

> Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. We do not doubt power in a proper case to issue such writs. But they have the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him. These remedies should be resorted to only when appeal is a clearly inadequate remedy. We are unwilling to use them as substitutes for appeals. As extraordinary remedies, they are reserved for really extraordinary causes.

*Ex Parte Fahey*, 332 U.S. at 259-60 (*quoted in Bankers Life*, 346 U.S. at 384-85).

The party seeking mandamus must show that it has no other means to obtain the relief it desires. *Kerr*, 426 U.S. at 403; *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943).

Thus, so long as an appeal is available in the regular course, mandamus should not be used to short-cut the process. *United States Alkali Export Ass'n* v. *United States*, 325 U.S. 196, 202-03 (1945). Petitioners have made no contrary showing; direct appeal is available here and the mandamus standard was properly applied.

Petitioners claim that a softer mandamus standard for recusal motions is necessary to prevent inconvenience is unconvincing. This Court has already established that mandamus will not issue merely to prevent judicial inconvenience and hardship. *Bankers Life*, 346 U.S. at 383; *United States Alkali Export Ass'n*, 325 U.S. at 202-03.

Petitioners urge two other reasons for their proposed new standard: a lower standard is necessary to prevent recusal from turning into a tactical game and because the well-established standard for mandamus review is insufficient to remove an alleged "cloud" over the litigation. (Pet. 17-18). Both contentions are flawed.

The standard advocated by Petitioners would only encourage meritless disqualification motions as a tactic for delay and harassment. Petitioners' suggested standard would encourage judge-shopping and give litigants an incentive to create a "cloud" that would not otherwise exist. The result would be to undermine public confidence in the judicial system.

Petitioners offer no reasonable explanation as to why direct appellate review is particularly inadequate on recusal motions. Petitioners' argument that any alleged "taint" must be immediately purged could be made in innumerable other contexts, *i.e.*, orders directing or denying production of documents claimed to be protected by attorney-client privilege or orders granting or denying disqualification of counsel. *Cf. Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368 (1981) (motion to disqualify counsel in civil case not reviewable on interlocutory appeal). Petitioners' rationale for the proposed exception, if fairly applied to other situations, would cause the exception to swallow the rule. In reviewing a similar request to reformulate the mandamus standard, this Court stated:

> If we applied the reasoning advanced by the petitioner, then every interlocutory order which is wrong might be reviewed [by writ of mandamus]. The office of a writ of mandamus would be enlarged to actually control the decision of the trial court rather than used in its traditional function of confining a court to its prescribed jurisdiction. In strictly circumscribing piecemeal appeal . . . [Congress intended mandamus] to be used only in the exceptional case where there is clear abuse of discretion or "usurpation of judicial power" . . . .

*Bankers Life*, 346 U.S. at 382-83.

There is simply no reason to carve out an exception to the mandamus standard for judicial recusal issues. Congress, in discussing the relevant recusal statute, 28 U.S.C. § 455(a), has expressed no contrary intention. *See* H.R. Rep. No. 1453, 93rd Cong., 2d. Sess. *reprinted in* 1974 U.S. Code Cong. & Admin. News 6351, 6355 (the "House Report"). This Court should have nothing to do with the mischief which would result from altering the standard for mandamus review.[8]

**B. The Standard for Mandamus Review Applied by the Second Circuit Does Not Conflict With the Standard Applied By Other Circuits.**

Despite the Second Circuit's correct application of the well-established standards for mandamus review, Petitioners contend that the Second Circuit's decision conflicts with the standards applied by the Fourth, Fifth and Seventh Circuits. Petitioners are wrong.

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[8] Contrary to Petitioners' contention, the Second Circuit's opinion is not "at odds" with this Court's decision in *Liljeberg v. Health Services Acquisition Corp.*, ___ U.S. ___, 108 S. Ct. 2194 (1988). (Pet. 16). Unlike *Liljeberg*, which was a direct appeal from a final decision, the Second Circuit decision involved mandamus review. The Second Circuit simply applied the *Liljeberg* test under the established mandamus standards. *See Moses H. Cone Memorial Hospital* v. *Mercury Construction Co.*, 460 U.S. 1, 18 (1983) (recognizing that the different standards applicable for direct appeal and mandamus may affect a court's ultimate determination). There is nothing here that need be reviewed on a writ of certiorari.

Petitioners argue that *In re Rodgers*, 537 F.2d 1196 (4th Cir. 1976), and *In re Faulkner*, 856 F.2d 716 (5th Cir. 1988), apply a mere error standard to the grant of mandamus and are in conflict with the Second Circuit decision. (Pet. 18-19). Neither *Rodgers* nor *Faulkner* discusses the standard applied in granting the writ of mandamus. Both cases merely state that the writ be issued. *Rodgers*, 537 F.2d at 1197 ("We grant the writ because we believe his disqualification is required. . . ."); *Faulkner*, 856 F.2d at 717 (". . . recusal is required, we grant the petition."). Since neither case discusses the standard, it must be assumed that the proper standard was applied, and there can be no conflict.

Similarly, there is no conflict between the Second Circuit's opinion and those of the Seventh Circuit. Petitioners quote selectively from *Union Carbide Corp.* v. *United States Cutting Service, Inc.*, 782 F.2d 710, 712 (7th Cir. 1986), to suggest that the Seventh Circuit has a more liberal mandamus standard than that applied by the Second Circuit. The *Union Carbide* court did not say that it liberally granted writs of mandamus. Rather, the court stated that it has "been liberal in allowing the use of the extraordinary writ of mandamus to review orders denying motions to disqualify." *Id.* at 712.[9] The language Petitioners quote does not go to the standard for granting writs of mandamus, but rather to the standard under which the Seventh Circuit will hear petitions for writs of mandamus. In fact, the court was quite careful to emphasize that,

> [o]f course, in frivolous and even routine cases in which a party challenges the judge's refusal to recuse himself, mandamus will be denied—with sanctions, if the petition for mandamus is frivolous.

*Id.* Thus, the Seventh Circuit does not apply a liberal mandamus standard; rather, it follows the well-settled rule that mandamus is available only in extraordinary cases.

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[9] The Seventh Circuit views denial of a motion to disqualify as not properly reviewable on direct appeal. *United States v. Balistrieri*, 779 F.2d 1191, 1204 (7th Cir. 1985), *cert. denied*, 475 U.S. 1095 (1986). Whether the Seventh Circuit is correct is not an issue now before this Court.

Despite Petitioners' attempts to intimate otherwise, there is no conflict among the Circuits and no reason to grant certiorari.

## III. THE SECOND CIRCUIT CORRECTLY APPLIED § 455(a) AND IS IN ACCORD WITH *LILJEBERG*.

In attacking the Second Circuit's determination that no basis for recusal exists, Petitioners argue that the court has failed to apply the correct legal standard. Petitioners claim that the reasonable person standard applied by the Second Circuit is too sophisticated, includes irrelevant factors and is in conflict with this Court's precedent and with that of other Circuits. These arguments must fail. Petitioners' real disagreement is with how the Second Circuit applied the correct legal principles to the facts. On the facts as found by the District Court and the Second Circuit, the court properly applied the legal standards that comport with all relevant statutory and decisional law, and there is no conflict between its decision or that of any other federal court or with any decision of this Court.

### A. The Second Circuit Applied the Correct Standard Under § 455(a) of a Reasonable Person Who Knows and Understands All the Relevant Facts.

Section 455(a) provides for the disqualification of a judge "in any proceeding in which his impartiality may reasonably be questioned." The Second Circuit stated that the standard for determining the appearance of impartiality is "an objective one which assumes that a reasonable person *knows and understands all the relevant facts.*" (emphasis in original) (citations omitted) (A13).[10] This standard is neither novel nor controversial and has been universally adopted by the federal courts of appeal considering the question. *See, e.g., Pepsico Inc.* v. *McMillen*, 764 F.2d 458, 460 (7th Cir. 1985); *United States* v. *DeLuna*, 763 F.2d 897, 907 (8th Cir.), *cert. denied*, 474 U.S.

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[10] The court so concluded after taking note of Congress' statement that

> The issue of disqualification is a sensitive question of assessing all the facts and circumstances in order to determine whether the failure to disqualify was an abuse of sound judicial discretion.

House Report at 6355.

980 (1985); *United States* v. *Dalfonso*, 707 F.2d 757, 760 (3d Cir. 1983).

Petitioners argue that the Second Circuit gave only "lip service" to the proper standard and applied a "subjective" test. (Pet. 9). Further, Petitioners argue that the Second Circuit conducted a factual analysis that could only be accomplished by a "super-sophisticated" individual and looked at the question of impartiality from the "purely legalistic perspective" of a sophisticated person. (Pet. 9, 10).

Petitioners' contention that the Second Circuit applied an incorrect standard is contrary to fact. The Second Circuit makes clear that the standard it applied is whether "a reasonable person knowing and understanding all the relevant facts would recuse the judge." (A14. *See also* A13, A18, A20). Despite Petitioners' assertion otherwise, the court's conclusion did not call for a "sophisticated observer well-versed in financial and legal niceties." (Pet. i). Rather, the Second Circuit simply reviewed the facts and concluded that the reasonable person would think Drexel's role in providing financing to Bain (SHI) (then not committed) and Mrs. Pollack's sale of stock to Bain (SHI) were too remotely situated to cause doubt about Judge Pollack's impartiality.

The Second Circuit was concerned that the dissenter's position would lead to an unjustifiable denigration of the reasonable person standard. The Second Circuit did not think that a reasonable person should be deemed incapable of understanding the existence, nature or lack of a relationship among or between parties, or that a reasonable person would draw a conclusion about a judge's fair-mindedness without knowledge of all the facts. Petitioners' attempt to convince this Court that the reasonable person is properly viewed as an individual devoid of reasoning capabilities is wasted; an evaluation of the reasonable person's perspective is at its essence a factual determination. The view which Petitioners urge is inconsistent with legislative history, with judicial interpretations of § 455(a) and with common sense.

**B. The Second Circuit's Discussion of Judge-Shopping Assertions Was Proper.**

Petitioners argue that the Second Circuit in its decision relied on matters "extraneous" to proper considerations under § 455(a). Specifically, they contend that the court improperly based its decision on allegations of judge-shopping by Drexel. (Pet. 11). Petitioners maintain that the Second Circuit erroneously balanced forum shopping concerns against appearances of impropriety and "invent[ed]" a " 'good guy, bad guy' balancing act." (Pet. 11, 12). This reading finds no support in the Second Circuit's decision.

*First*, although the court expressed its concern that indicia of judge-shopping were present, it stated that the "assertions are not established facts upon which decision may rest" and, thus, "our decision does not turn on these assertions." (A18, A20). *Second*, the Second Circuit said that, if those circumstances indicating judge-shopping were to be considered, they would be viewed not as competing with a policy weighing against a finding of an appearance of impropriety, but rather would be one of the facts taken into consideration by the reasonable person in assessing the existence of that impropriety. (A18, A20). Thus, the question that Petitioners ask this Court to decide simply is not presented by the Second Circuit's opinion.

**C. The Second Circuit's Decision Is Not in Conflict with This Court's Decision in *Liljeberg* or With Any Decision of Other Circuits.**

Petitioners claim that the Second Circuit's decision is "at odds" with this Court's decision in *Liljeberg* v. *Health Services Acquisition Corp.*, ___ U.S. ___, 108 S. Ct. 2194 (1988). (Pet. 12). In *Liljeberg*, this Court held that a judicial officer's scienter was not an element of § 455(a) and affirmed the opinion of the Fifth Circuit Court of Appeals mandating disqualification. 108 S. Ct. at 2202. In doing so, this Court noted that the applicable standard was that of an "objective observer", 108 S. Ct. at 2203, and cited without disagreement the lower court's formulation of "a reasonable person, knowing all the circumstances." 108 S. Ct. at 2202 (*citing* 796 F.2d at 802).

Petitioners contend that the facts of the instant case spell out a clearer case for disqualification than those in *Liljeberg*. (Pet. 12). Not only do Petitioners again ask for a factual review and present no legal issue, but they provide an underlying factual assessment that is inaccurate. Petitioners suggest that while Judge Pollack somehow stood to gain a financial benefit, the trial judge in *Liljeberg* merely had the fulfillment of fiduciary duties at stake. (Pet. 12-13). This is a misstatement of the facts in the instant case. As noted above, the Second Circuit and the District Court found that Drexel's activity could not be reasonably viewed as inuring to the benefit or detriment of Judge Pollack or his wife. (A17-18). Unlike in *Liljeberg*, where the trial judge's rulings in the case before him directly benefited Loyola University, the party with which he was associated (*see* 108 S. Ct. at 2197-98), in this case Judge Pollack will make no ruling that can benefit or harm him, his wife or any entity in which they have an interest, financially or otherwise.

Petitioners' attempt to state a "direct conflict" between the Second Circuit and the decision of the Fifth Circuit in *Faulkner* falls flat. In *Faulkner*, the court said that the view of the "average, reasonable person" is the standard for analysis. 856 F.2d at 720. Notwithstanding Petitioners' suggestion otherwise, the court's use of the modifier does not conflict with the standard accepted by the Second Circuit and other federal courts of appeal. *Faulkner*, quoting *Liljeberg*, recognized that the standard is that of "a reasonable person, knowing all the circumstances." 856 F.2d at 721 (*quoting* 108 S. Ct. at 2202).

Petitioners' reliance on *Parker* v. *Connors Steel Co.*, 855 F.2d 1510 (11th Cir. 1988), to create a conflict is disingenuous. The test applied in *Parker* was "whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought" would find the judge impartial. *Id.* at 1524. The formulation of this test does not substantively differ from that followed by the Second Circuit.

Neither *Faulkner* nor *Parker* conflicts with the decision by the Second Circuit in the instant case.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 5, 1989

## APPENDIX

## EXCERPTS FROM CONSENT AND UNDERTAKINGS OF DREXEL BURNHAM LAMBERT INCORPORATED AND THE DREXEL LAMBERT GROUP INC.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Securities and Exchange Commission,

*Plaintiff,*

v.

Drexel Burnham Lambert Incorporated;
Drexel Burnham Lambert Group Incorporated;
Michael R. Milken;
Lowell J. Milken;
Cary J. Maultasch;
Pamela R. Monzert;
Victor Posner;
Steven N. Posner;
and
Pennsylvania Engineering Corporation,

*Defendants.*

88 Civ. 6209 (MP)
Consent and Undertakings of Drexel Burnham Lambert Incorporated and The Drexel Lambert Group Inc.

1. Defendants DREXEL BURNHAM LAMBERT INCORPORATED and THE DREXEL BURNHAM LAMBERT GROUP INC. (hereinafter referred to as "DREXEL" and "GROUP," respectively) acknowledge service upon them of the COMPLAINT FOR PERMANENT INJUNCTION AND OTHER EQUITABLE RELIEF ("COMPLAINT") of Plaintiff SECURITIES AND EXCHANGE COMMISSION

("COMMISSION") in this action, enter a general appearance, admit the service of the COMPLAINT upon them and consent to the jurisdiction of this Court over them and over the subject matter of this action.

2. DREXEL and GROUP, without admitting or denying any of the allegations of the COMPLAINT, except as to jurisdiction which each of them admits, and consistent with the provisions of 17 C.F.R. Section 202.5(e), hereby consent to the entry of a FINAL JUDGMENT OF PERMANENT INJUNCTION AND OTHER RELIEF AS TO DREXEL BURNHAM LAMBERT INCORPORATED AND THE DREXEL BURNHAM LAMBERT GROUP INC. in the form annexed hereto ("FINAL JUDGMENT"), restraining and enjoining DREXEL and GROUP from engaging in transactions, acts, practices and courses of business which constitute or would constitute violations of Sections 7(c), 7(f), 9(a)(2), 10(b), 13(d), 14(a), 14(e), 15(c)(3) and 17(a)(1) of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. §§ 78g(c), 78g(f), 78i(a)(2), 78j(b), 78m(d), 78n(a), 78n(e), 78o(c)(3) and 78q(a)(1)], Regulations T and X and Rules 10b-5, 10b-6, 13d-1, 13d-2, 14a-9, 14e-3, 15c3-1, 17a-3 and 17a-4 promulgated hereunder [12 C.F.R. §§ 240.10b-5, 10b-6, 13d-1, 13d-2, 14a-9, 14e-3, 15c3-1, 17a-3 and 17a-4] and Section 17(a) of the Securities Act of 1933 ("Securities Act") [15 U.S.C. §§ 78q(a)], and which aid and abet or would aid and abet violations of Sections 7(c), 9(a)(2), 10(b), 13(d), 14(e), 15(c)(3) and 17(a)(1) of the Exchange Act [15 U.S.C. §§ 78g(c), 78i(a)(2), 78j(b), 78m(d), 78n(e), 78o(c)(3) and 78q(a)(1)] and Regulation T and Rules 10b-5, 13d-1, 13d-2, 14e-3, 15c3-1, 17a-3 and 17a-4 promulgated thereunder [12 C.F.R. § 220.1 et seq., and 17 C.F.R. §§ 240.10b-5, 13d-1, 13d-2, 14e-3, 15c3-1, 17a-3 and 17a-4].

3. DREXEL and GROUP waive the entry of findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure.

4. DREXEL and GROUP agree that paragraphs 1 through 15 and 28 through 36 of this CONSENT AND UNDERTAKINGS ("CONSENT") shall be incorporated into the FINAL JUDGMENT by reference.

* * *

34. DREXEL and GROUP each agrees not to petition the Supreme Court of the United States for a writ of certiorari, or to seek or to join further in the motions of others requesting the recusal of the Honorable Milton Pollack in this and all related actions. DREXEL and GROUP each further agrees not to seek any stay of proceedings in this action, and to join the COMMISSION in any application to lift any such stay, as such stay may affect the consideration, entry, implementation, administration and enforcement of the FINAL JUDGMENT by the Court, it being understood that if the action commenced by the COMPLAINT is reassigned to a judge other than the Honorable Milton Pollack, then DREXEL and GROUP and the COMMISSION shall jointly move that the implementation, administration and enforcement of the FINAL JUDGMENT be reassigned to the same judge.

* * *

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IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1988

MICHAEL R. MILKEN, LOWELL J. MILKEN, and PAMELA R. MONZERT,

*Petitioners,*

*v.*

SECURITIES AND EXCHANGE COMMISSION,

*Respondent.*

## MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1988

MICHAEL R. MILKEN, LOWELL J. MILKEN, and PAMELA R. MONZERT,

*Petitioners,*

*v.*

SECURITIES AND EXCHANGE COMMISSION,

*Respondent.*

## MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Movants request that this Court grant them leave to file a brief *amicus curiae* in opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit filed by Michael R. Milken, *et al* ("Petition"). Petitioners have failed to give their consent. (A24)

This Motion is filed on behalf of the class action plaintiffs ("Class Plaintiffs") in *In re: Ivan F. Boesky Securities Litigation,* MDL Doc. No. 732 M21-45-MP ("*Boesky Litigation*")[1] and on behalf of Plaintiff Mat-

1. The *Boesky Litigation* consists of shareholder class actions on behalf of public securities holders allegedly injured by the insider trading of Boesky and others, including Drexel agents, and non-class action suits on behalf of investors in Boesky-affiliated entities who were allegedly defrauded through offering material failing to disclose securities law violations relating to, *inter alia,* such insider trading. The cases were transferred to Judge Milton Pollack by action of the Panel for Multidistrict Litigation on August 5, 1987. (PA 4-5)

thew C. Budinko ("Budinko") in *Budinko v. Boesky, et al.,* 89 Civ. 0845 (S.D.N.Y.) ("*Budinko*").

In 1986 Class Plaintiffs filed complaints against Ivan F. Boesky ("Boesky"), Drexel Burnham Lambert, Inc. ("Drexel"), former Drexel employee Dennis Levine ("Levine"), and others alleging that defendants, *inter alia,* traded in publicly held securities on the basis of inside information. (PA4-5) In 1989 Budinko filed a class action complaint against Boesky, Drexel, and, *inter alia,* the Petitioners herein, for violations of the federal securities laws arising out of alleged illegal agreements and insider trading. Budinko filed his complaint in the Southern District of New York as a related case to the *Boesky Litigation* and *SEC v. Drexel Burnham Lambert, Inc., et al.,* 88 Civ. 6209 MP (S.D.N.Y.) ("*SEC* action").[2] The actions were assigned to Judge Milton Pollack and were to be administered on a coordinated basis for pretrial purposes. (A2)

Shortly after the SEC filed its action, Drexel moved for recusal before the district court and upon denial of its motion then petitioned for a writ of mandamus before the Second Circuit in connection with the *SEC* action and the *Boesky Litigation.* Petitioners, because not then parties to the *Boesky Litigation,* sought mandamus in the *SEC* action only. On November 15, 1988, the Court of Appeals for the Second Circuit denied the defendants' petitions. The defendants then moved for rehearing and rehearing *en banc,* which motions were denied on February 21, 1989.

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2. The SEC filed its complaint against Drexel and Petitioners on September 7, 1988. (PA8) The gravamen of the SEC complaint is the existence of a secret arrangement between Boesky, Drexel, and Milken to violate the federal securities laws by engaging in insider trading, stock manipulation, and fraud in connection with offering materials made to Boesky investors. The SEC filed its complaint as a related case to the *Boesky Litigation,* and it was assigned by the district court to Judge Milton Pollack. (A1)

The matter of recusal in the *Boesky Litigation* is no longer a subject of judicial review, because, while still a defendant in the *Boesky Litigation,* Drexel did not petition this Court for a writ of certiorari. Nevertheless, Movants have a strong interest in the proceedings currently before the Court because disposition of the Petition will directly affect them. Private actions included in or related to the *Boesky Litigation* and pending before Judge Pollack now name or seek to name as defendants some or all of the Petitioners before this Court. Moreover, the private actions until the stay of the mandate had been administered on a coordinated basis with the *SEC* action. Therefore, while the Second Circuit's denial of rehearing *en banc* sets the law in the private actions, those actions will be disrupted if the Petition is granted. Petitioners' repeated attempts to recuse Judge Pollack, which began immediately after the *SEC* action was assigned to him, have and continue to block the forward motion of Movants' case. Movants, in the best position to do so, request the opportunity to protect their interest in avoiding any further disruption and delays.

Furthermore, while Petitioners have failed to consent to Movants' participation in the Petition proceedings, they have injected these proceedings into the *Boesky Litigation* by moving to stay the *Boesky Litigation* and *Budinko* pending the Supreme Court's disposition of the Petition. (A4,5) Moreover, and despite that motion to stay, Petitioners have moved before the Judicial Panel on Multidistrict Litigation to, in part, transfer *Budinko* to either the Eastern District of Pennsylvania or the Central District of California. (A6)

Petitioners have also objected to the joint motion of the SEC and Drexel to modify the stay in the *SEC* action solely to permit the district court to consider and, if appropriate, enter and administer the proposed final Judgment against Drexel and Cary Maultasch, neither of whom now seek to recuse Judge Pollack. (A22-23) Petitioners' objection delays and hinders, *inter alia,*

forward movement in the private litigation because, pursuant to the final Judgment, not only will Drexel be obligated to cooperate in discovery, but Drexel will also pay $350 million into a civil disgorgement fund to persons with valid damages claims against Drexel under the federal securities laws. (A22-23)

Movants have interests which are and will be affected by the Petition and its disposition. Movants respectfully request that they be given the opportunity to protect their interests by filing a brief *amicus curiae* in opposition to the petition for certiorari.

Respectfully submitted,
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IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1988

MICHAEL R. MILKEN, LOWELL J. MILKEN, and PAMELA R. MONZERT,

*Petitioners,*

*v.*

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*Respondent.*

## BRIEF OF *AMICUS CURIAE* IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT


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Co-Lead Counsel for Class Plaintiffs in *In re: Boesky Securities Litigation,* MDL Docket No. 732 M21-45-MP (S.D.N.Y.), and Counsel for Class Plaintiff Matthew C. Budinko in *Budinko v. Boesky, et al.,* 89 Civ. 0845 (S.D.N.Y.).

## QUESTIONS PRESENTED

1. Did the Court of Appeals for the Second Circuit depart from applicable decisions of this Court or render a decision in conflict with the decision of another federal court of appeals on the same matter when the court held that recusal under 28 U.S.C. §455(a) is not appropriate unless a reasonable person, knowing all the facts and circumstances, would question the judge's impartiality?

2. Did the Court of Appeals for the Second Circuit depart from applicable decisions of this Court or render a decision in conflict with the decision of another federal court of appeals on the same matter when the court held (1) that the exceptional remedy of mandamus will only be invoked where the petitioner has demonstrated that its right to such relief is clear and indisputable and (2) that the decision of a district court on the issue of recusal is reviewed for abuse of discretion?

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## STATEMENT OF THE CASE

On November 15, 1988, the Second Circuit denied Petitioners' and Drexel's (collectively, "defendants") petition for writ of mandamus:

> In sum, we conclude that an objective observer knowing and understanding all the facts and circumstances could not reasonably question Judge Pollack's impartiality. Petitioners have not clearly and indisputably established their right to a writ. Accordingly, for the reasons stated, the petition for a writ of mandamus is denied. (PA 22)

On February 21, 1989, the Second Circuit denied defendants' motion for rehearing *en banc.*[3] (PA 33) Opinions in support of the denial stated that:

> In suggesting in banc review in this case, petitioners have neither demonstrated a lack of uniformity in our decisions relating to recusal of district court judges nor identified a legal question of transcending importance. . . . Accordingly, the standard for in banc review simply has not been met. (PA 38)

The repeated and unsuccessful efforts to recuse Judge Pollack, which culminated in the successive failures before the Second Circuit, began only after the *SEC* action was assigned to Judge Pollack as a related case to the *Boesky Litigation* and were originally directed only to the *SEC* action.

Those first efforts took the form of an *ex parte* phone call to Judge Pollack at his home on September 10, 1988. Concerned that the call had been made *ex parte* and without notice to opposing counsel, and concerned that

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3. Petitioners were not privy to the Second Circuit's deliberations and have no basis for their representation to this Court that rehearing was denied after "three months of deliberations." (P 7)

counsel alleged the need for recusal without investigating or verifying the basis of those allegations, the court scheduled a hearing for September 13, 1988. (A7-8, 10, 12)

The September 13 hearing provided counsel for defendants with the opportunity to discuss at length the reasons for *ex parte* communications with the court who also reminded counsel of their responsibilities under Rule 11:

> You didn't make any investigation at all to find out what you were talking about before you approached a judge who was handling a lawsuit? (A10)

Defendants also discussed the related case status of the *SEC* action and conceded that the dispute before the court "really has to do with what started this in the beginning and that is the relation of this case to this court by the Commission." (A9)

After the district court's repeated requests that defendants provide some factual basis for their allegations concerning recusal, defendants then filed a motion to recuse in the *SEC* action only on September 20, 1988. (PA 9) The return date, October 11, was set at a discovery hearing on September 22.

During the September 22 hearing the court denied defendants' motion to stay coordinated discovery pending disposition of the recusal motion. (A 14-15) On September 27, Drexel then filed its recusal motion and heavily redacted supporting papers in the *Boesky Litigation*. Drexel made its motion returnable on October 11, 1988. (A 16-19)

Three days later and while the recusal motions were pending before the district court, defendants petitioned the Court of Appeals for a writ of mandamus seeking to recuse Judge Pollack in the *SEC* action only. (PA 9) Defendants did not mention the companion recusal

motion filed three days earlier in the *Boesky Litigation* and did not serve Class Plaintiffs with the petition papers.

The hearing on the recusal motions took place as scheduled before the district court on October 11, 1988. Six days later the court issued its opinion. (PA 45-50) The district court concluded that it could:

> confidently respond, unhesitatingly, that under all the actual facts and circumstances herein, it has no doubt that a reasonable person, a member of the public, would fail to perceive even the slightest doubt of the appearance of the Judge's impartiality. (PA 49)

Defendants then petitioned for a writ of mandamus before the Court of Appeals for a second time.

In their numerous trips to the bench, defendants have advanced two contradictory arguments for recusal: first, that Drexel's business dealings with a third-party (Bain Venture Capital) created an appearance of partiality because that arrangement would suggest to an observer that the district court might favor Drexel; second, comments directed to defendants' counsel during hearings and in the October 17 opinion created an appearance of partiality in that the comments would suggest to an observer that the district court disfavored Drexel. Under the guise of arguments for certiorari review, Petitioners advance those arguments again before this Court, this time without Drexel.

## SUMMARY OF ARGUMENT

Petitioners advance no special or important reason which would warrant this Court's exercise of its discretion to grant review on writ of certiorari. Petitioners have quoted the appellate court's decision out of context and misconstrued relevant decisions of this Court and the various circuits in an effort to manufacture grounds for review.

## ARGUMENT

### I. The Second Circuit's decision reflects a faithful application of §455(a) and does not conflict with *Liljeberg* or decisions of other circuit courts.

Under 28 U.S.C. § 455(a) "any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The Second Circuit, as well as other circuits, has uniformly and consistently construed this statute to mean that § 455(a) "sets up an objective standard for recusal, creating a so called 'appearance of justice' rule." *In re: IBM Corp.*, 618 F.2d 923, 929 (2d Cir. 1980); *see also Anderson v. Local 3 International Brotherhood of Electrical Workers,* 751 F.2d 546, 549 (2d Cir. 1984). The test for determining when recusal is warranted is "whether an objective, disinterested observer fully informed of all the facts underlying the grounds on which recusal was sought would entertain a significant doubt that justice would be done in the case." *Pepsico, Inc. v. McMillan*, 764 F.2d 458, 460 (7th Cir. 1985).

Last year this Court reaffirmed that recusal for an "appearance of impropriety" turns upon a specific showing by the movant that an interest or a relationship is such that, armed with all the facts, a reasonable observer would infer impropriety. *See Liljeberg v. Health Services Acquisition Corp.*, ___ U.S. ___, 108 S.Ct. 2194 (1988).[4]

---

4. The primary issue before this Court was whether scienter is an element of a section 455(a) violation. The Court held that actual knowledge was not necessary, but that actual knowledge would go to the question of remedies. *See Liljeberg*, 108 S.Ct. at 2202-03. "[R]ecusal is required even when a judge lacks actual knowledge of the facts indicating his interest or bias in the case if a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge." *Id.* at 2202.

As the Second Circuit's opinion and decision clearly show, before declining to issue the writ of mandamus, the court carefully analyzed governing law and principles and applied them to the facts before the court. The court expressly acknowledged that the "amended section establishes an objective standard 'designed to promote public confidence in the impartiality of the judicial process.' " (PA 13)

By misconstruing the nature of the disagreement between the majority of the Second Circuit panel and the dissent, Petitioners attempt to create a conflict between the Second Circuit's holding and *Liljeberg* where there is none. Contrary to Petitioners' representations, the dispute between the panel majority and the dissent does not concern defining who is the reasonable person, that is, an "average" person as opposed to a supersophisticate. Instead that dispute concerns determining what that reasonable person would infer when armed with all the facts. (PA 13-14) Cases cited by Petitioners are simply beside the point.

Furthermore, not only do the panel majority and the dissent disagree over *what* conclusions a reasonable person would draw, but they also differ as to *how* to ascertain those conclusions. When the majority refers to "the purely legalistic perspective," it is not defining the reasonable person but is asserting that:

> [l]ike all legal issues, judges determine appearance of impropriety – not by considering what a straw poll of the only partly informed man-in-the-street would show – but by examining the record facts and the law, and then deciding whether a reasonable person knowing and understanding all of the relevant facts would recuse the judge. (PA 14)

The majority's rejection of "straw polls" is required by section 455(a) and *Liljeberg* and is not in conflict with them. Furthermore, the majority's holding is consistent with public policy which refuses to reward those who

argue their cases not only in the courts, but in the press. *See, e.g., In re: United States,* 666 F.2d 690, 695 (1st Cir. 1981); *United States v. Haldeman,* 550 F.2d 31, 136-37 (D.C. Cir. 1976).

Petitioners also attempt to reargue for the fifth time the merits of their initial motion by urging that the majority's opinion further conflicts with *Liljeberg* in that the facts which were before the courts of the Second Circuit were more compelling than those which were before this Court when it decided *Liljeberg*. Petitioners' argument, however, ignores what the relevant facts of *Liljeberg* were: "[t]he success and benefit to Loyola [of which Judge Collins was a trustee] of these negotiations turned, *in large part,* on *Liljeberg prevailing in the litigation before Judge Collins.*" *Liljeberg*, 108 S.Ct. at 2197 (emphasis added). *Liljeberg* confirmed that appearances of partiality arise when there is a nexus between the litigation and the transaction at issue — that is, that the court could render decisions which would affect that transaction. The Second Circuit properly understood *Liljeberg* to require some kind of nexus. (PA 14)

Petitioners have never provided any evidence of a nexus or relationship between the transaction which purportedly required the district court's recusal and the pending litigation. Petitioners have never demonstrated how the litigation could or did affect the transaction. What facts there are show the contrary. (PA 6) That Drexel was willing to continue with the transaction and in fact complete it proves that there was no connection or nexus with the litigation. Petitioners have admitted as much. For example, by affidavit, Counsel for Petitioner Michael Milken averred that "[n]either Palais Royal nor its shareholders [among them Judge Pollack's wife] have any interest in who presides in the SEC case." (A 21)

Furthermore, Petitioners' arguments are rendered moot by the completion of that transaction. No continuing "taint" or "cloud" is present, particularly since

Drexel did not petition for certiorari and Petitioners have never argued that they individually had any interest or involvement in the transaction. Their standing to join in the recusal motion was always derivative – they joined in the motion simply as employees of Drexel. And, if and when Petitioners are no longer employees of or associated with Drexel (P 8), their excuse for prolonging the recusal issue evaporates entirely. Dennis Levine, also a defendant in the proceedings before Judge Pollack, is a former employee of Drexel and yet never joined in the recusal efforts. He is represented by the same Counsel as Petitioner Michael Milken. Presumably Levine did not join because his Counsel recognized that as a former employee of Drexel the alleged appearance of partiality did not encompass him and that his interests were in fact adverse to those of Drexel. It is therefore particularly perplexing that the same Counsel now argues on behalf of Mr. Milken that the purported adverse position of Drexel and Milken provides additional grounds for recusal. (P 8)

## II. Mandamus is an extraordinary remedy and the standard of review is for abuse of discretion.

Petitioners' objection to the standard of review employed by the Court of Appeals is without merit and rests upon a misreading of relevant law.

The decision whether to recuse himself is in the first instance with the district judge and is to be reviewed for abuse of discretion. It is settled law that a motion to recuse under § 455(a), no matter when or at what stage of the litigation the motion is brought, is committed to the sound discretion of the district court. *See, e.g., In re: City of Detroit,* 828 F.2d 1160, 1167 (6th Cir. 1987); *United States v. Balistrieri,* 779 F.2d 1191, 1204 (7th Cir. 1985); *United States v. Meester,* 762 F.2d 867 (11th Cir. 1985); *In re: City of Houston,* 745 F.2d 925, 927 (5th Cir. 1984); *In re: Federal Sky-Walk Cases,* 680 F.2d

1175 (8th Cir. 1982); *In re: United States,* 666 F.2d 690 (5th Cir. 1981); *Johnson v. Trueblood,* 629 F.2d 287, 290 (3d Cir. 1980); *In re: Virginia Electric and Power Co.,* 539 F.2d 357, 369 (4th Cir. 1976). In the Second Circuit as well, the standard of review has been and is for abuse of discretion. *See, e.g., In re: IBM Corp.,* 618 F.2d 923 (2d Cir. 1980). *Liljeberg* did not change that law.

Petitioners mislead when they cite decisions for their implicit position that a relaxed standard of review is applied in the context of mandamus review. *See, e.g., United States v. Balistrieri,* 779 F.2d 1191 (7th Cir. 1985) (petition was denied under abuse of discretion standard); *In re: IBM Corp.,* 618 F.2d 923 (2d Cir. 1980).

Petitioners also confuse two distinct questions. The first question, which was not even in dispute before the lower court, concerns whether a court should even entertain a petition for mandamus filed to review the denial of a motion to recuse. *See, e.g., Union Carbide Corp. v. U. S. Cutting Service, Inc.,* 782 F.2d 710, 712-13 (7th Cir. 1986) ("in recognition of this point we have been liberal in allowing the use of the extraordinary writ of mandamus to review orders denying motions to disqualify"); *In re: IBM Corp.,* 618 F.2d 923 (2d Cir. 1980).

The second question, which was in issue before the court, concerns under what circumstances the writ of mandamus will issue. The Court answered correctly: the writ of mandamus is an extraordinary remedy, and the petitioner must show that his "right to the writ is clear and indisputable." *Moses H. Cohen Memorial Hospital v. Mercury Construction Co.,* 460 U.S. 1, 18 (1983); *Allied Chemical Corp. v. Daiflon, Inc.,* 449 U.S. 33, 34 (1980); *Kerr v. United States District Court,* 426 U.S. 394, 402 (1976); *see also Carlenstolpe v. Merk & Co.,* 819 F.2d 33, 35 (2d Cir. 1987); *In re: City of Houston,* 745 F.2d 925 (5th Cir. 1984) (question of recusal is reviewable on

petition for writ of mandamus, but petition will not lie in absence of exceptional circumstances); *In re: IBM Corp.*, 618 F.2d 923 (2d Cir. 1980) (writ of mandamus can be used to compel trial judge to recuse himself, but only if petitioner satisfies his burden of establishing that his right was clear and indisputable).

The Second Circuit's application of well-settled and uniform legal principles to the case before it was correct. Those principles too have withstood the test of time. The judicial interest in the timely filing of recusal motions is outweighted by the predominate interest in avoiding piecemeal litigation, minimizing what are essentially interlocutory appeals, and preventing recusal motions from becoming devices for harassment and delay.

Petitioners' arguments before this Court and their litigation strategy before the lower courts abandon these compelling interests. The Second Circuit was right to be concerned about judge shopping and the misuse of mandamus. (PA20)

## CONCLUSION

Petitioners use certiorari as an additional device to complicate already complicated litigation and to further obstruct the efforts of *amicus curiae* and others to obtain a hearing on the merits of their claims against Petitioners. Apparently with limitless resources, Petitioners tax the limited resources of the courts and of the litigants. The Petition is frivolous. *Amicus curiae* respectfully requests that this Court decline to exercise its discretion to review.

Respectfully submitted,

BERGER & MONTAGUE, P.C.

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# APPENDIX

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# UNITED STATES DISTRICT COURT
# SOUTHERN DISTRICT OF NEW YORK

| | | |
|---|---|---|
| SECURITIES AND EXCHANGE COMMISSION, | : | |
| | : | 88 CIV. No. 3209 |
| Plaintiff, | : | |
| | : | STATEMENT OF |
| | : | RELATIONSHIP TO |
| v. | : | PENDING ACTIONS |
| | : | |
| DREXEL BURNHAM LAMBERT INC. et al., | : | |
| | : | |
| Defendants. | : | |
| | : | |

Plaintiff Securities and Exchange Commission ("Commission") respectfully notes, pursuant to Rule 15 of the Rules for the Division of Business Among District Judges, Southern District,[1] that this action is related to various private civil actions against Ivan F. Boesky ("Boesky"), Drexel Burnham Lambert Inc. ("Drexel") and others now pending before Judge Milton Pollack. These private civil cases have been consolidated for pretrial proceedings, transferred to the Southern District of New York, and all assigned to Judge Pollack by an order of the judicial panel on Multidistrict Litigation dated August 5, 1987. *In re Ivan F. Boesky Securities Litigation,* MDL Dkt. No. 732, M-21-45-MP ("Boesky).

1. Rule 15 provides, in pertinent part, as follows:
"Cases are related if they present common questions of law and fact, or arise from the same source or substantially similar transactions, happenings, events or relationships, or if for any other reason they would entail substantial duplication of labor if assigned to different judges."

# UNITED STATES DISTRICT COURT
# SOUTHERN DISTRICT OF NEW YORK

| | |
|---|---|
| | ORDER NO. 34 |
| In re IVAN F. BOESKY SECURITIES LITIGATION | MDL Dkt. No. 732<br>M21-45-MP |
| SECURITIES AND EXCHANGE COMMISSION,<br>Plaintiff,<br>-against-<br>DREXEL BURNHAM LAMBERT INCORPORATED, *et al.*,<br>Defendants. | 88 Civ. 6209 (MP)<br>THIS DOCUMENT RELATES TO ALL CASES: |

A hearing having been held on September 22, 1988 to consider discovery program and the Court's draft provisions therefor, and counsel having been heard and the Court having requested that comments and suggestions of counsel be submitted to the Court on or before September 27, 1988, and the Court having received certain suggestions and it being indicated that others may be forthcoming, and it appearing appropriate in the interests of avoiding unnecessary delay to permit the parties in the various suits to move forward with respect to pending documentary discovery without delay, it is meanwhile

ORDERED THAT:

1. To entitle consideration of any further suggestions or comments of counsel in respect to the discovery program, the same shall be submitted to the Court's chambers on or before noon of September 30, 1988;

2. Orders, pleadings, motions, and other documents in the action entitled *Securities and Exchange Commission v. Drexel Burnham, Lambert Inc., et al.,* 88 Civ. 6209 (MP), shall be filed and docketed separately;

3. The above-entitled actions are not consolidated for pretrial purposes at the present time, but discovery in the above-entitled matters shall be coordinated to avoid and prevent duplication and conflicts on common subjects and common issues of fact;

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

| | | |
|---|---|---|
| In re IVAN F. BOESKY SECURITIES LITIGATION | : | MDL Dkt. No. 732<br>M21-45-MP |
| ARDEN WAY ASSOCIATES et al., Plaintiffs, v. IVAN F. BOESKY et al., Defendants. | : | 87 Civ. 1865 (MP) |
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| BANKERS LIFE AND CASUALTY COMPANY, Plaintiff, v. IVAN F. BOESKY et al., Defendants. | : | 89 Civ. 1882 (MP) |

**REPLY MEMORANDUM IN SUPPORT OF MOTION OF MICHAEL R. MILKEN AND LOWELL J. MILKEN TO STAY PROCEEDINGS PENDING SUPREME COURT DISPOSITION OF THEIR CERTIORARI PETITION**

standing to seek a stay of proceedings before this Court prior to any decision on that motion.

**Conclusion**

For the foregoing reasons, and those set forth in our opening Memorandum, all proceedings in the above-captioned cases should be stayed pending Supreme Court disposition of Movants' petition for a writ of certiorari.[8]

Dated: April 24, 1989
New York, New York

Respectfully submitted,

By_____
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Attorneys for Lowell J. Milken

---

8. Movants respectfully request that, if their motion is denied, this Court certify the question for an immediate interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

**BEFORE THE JUDICIAL PANEL**
**ON MULTIDISTRICT LITIGATION**

| | | |
|---|---|---|
| IN RE IVAN F. BOESKY SECURITIES LITIGATION | ) | MDL Docket No. 732 |

**MOTION TO TRANSFER ACTIONS FOR COORDINATED OR CONSOLIDATED PRETRIAL PROCEEDINGS PURSUANT TO 28 U.S.C. § 1407**

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Michael R. Milken

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

88 Civ. 6209 (MP)

v.

DREXEL BURNHAM LAMBERT INCORPORATED,
et al.,
Defendants.

---

September 13, 1988
11:30 a.m.

Before:

HON. MILTON POLLACK,

District Judge

APPEARANCES

THOMAS C. NEWKIRK,
ROBERT B. BLACKBURN,
GARY LYNCH,
BARRY GOLDSMITH,
Attorneys for the SEC

CURTIS MALLET-PROVOST COLT & MOSLE
*Attorneys for defendants*
BY: PETER FLEMING,
of Counsel

CAHILL, GORDON & REINDEL
*Attorneys for defendants*
BY: THOMAS F. CURNIN,
of Counsel.

(In chambers)

THE COURT: Let me just say as background for this, I will call it a closed meeting in view of some of the things that I have learned about the matter.

I am considerably troubled about the propriety of the way I was approached on this matter. I was called at 4:30 on Saturday afternoon at my home and what the operator said was it was a conference call, but it was a conference call relating to a case pending before me without apparently notice or inclusion of the adversary involved.

Mr. Fleming or Mr. Curnin or both said that they had talked to Arthur Liman, who then referred the matter to Judge Rifkind, who suggested that I be notified in the way I was notified. I haven't checked with Judge Rifkind.

MR. FLEMING: Judge –

THE COURT: Counsel, after starting out to mention something to do with Palais Royal in which my wife has had lifelong interests largely through her first husband's estate was in the process of receiving $50 or $60 million from Drexel Burnham and we had gotten about that far and I said, I don't know what this has got to do with me, but I think you had better have your opposite counsel in my chambers I think I mentioned Monday, and forgot that Monday was the religious holiday that I observe, and then mentioned Tuesday and Mr. Curnin or Mr. Fleming said that he would notify the Commission and ask that the parties be present.

That is a little troublesome for me particularly due to the proliferation of allegations and response and the response and allegations that have been going on in the press the last couple of days that two members of the bar for whom I have the highest regard, I know both of these fellows, Peter Fleming tried a case before me years ago and I dubbed him one of the best trial lawyers that I had heard in my time in the court and before that.

Tom Curnin I have known quite some time and have known him very favorably, but in rethinking what they were trying to tell me and calling me at home in the absence of an adversary, particularly in a case that seems to have some sensitivity, and as I reflect on it what they were telling me was something that might indicate that I was partial or would be partial to Drexel because of some interest that my wife had in Palais Royal. I couldn't figure it out.

Now, they are here to tell you why you should know about my wife and Palais Royal. Let me say at the outset I haven't the slightest economic or any other interest in Palais Royal and I have never have had and my wife's interests are largely those inherited from her first somehow or other and they didn't know about it.

MR. FLEMING: I am talking about appearances. I am not analyzing the situation.

THE COURT: You were attacking me professionally.

MR. FLEMING: No, we were not. You know me from a long while and I have never enjoyed arguing with any court and particularly with your Honor.

We are not attacking you professionally. We felt a professional obligation and Judge Rifkind confirmed that we should advise you of these facts. That is not an attack. That is information.

If I could start, your Honor, because I am flatly concerned about something else. This really has to do with what started this in the beginning and that is the relation of this case to this court by the Commission.

THE COURT: I am not going to let you get into that in this discussion. That is a separate subject entirely.

MR. FLEMING: Can I ask just two questions?

THE COURT: I read the newspapers about that.

MR. FLEMING: I wasn't there.

THE COURT: I don't want to have this matter clouded in any way by anything to do with the first attempt to nudge me out of the case. Forget it, please. I

know why I asked for this meeting and it has to do with whether Pollack –

THE COURT: Did you get a copy of the contract before you called me?

MR. CURNIN: No, Judge, because I didn't think it was necessary.

THE COURT: Are you for real?

MR. CURNIN: Yes, Judge, I am for real. What I thought was important and what Peter thought was important –

THE COURT: You mean you don't know at this point as to who the stockholders contracted with?

MR. CURNIN: I know what information –

THE COURT: Other than what I told you this morning?

MR. CURNIN: Judge, I am going to give you all the information and give the SEC all the information I have.

THE COURT: Look, Tom, don't avoid me. Are you saying you don't know what the contract says and with whom the stockholders contracted?

MR. CURNIN: I believe that I have a general understanding of who the parties are and what the obligation is. I do not know all the detail of it and I conveyed to your Honor and Peter and we jointly conveyed to your Honor whatever information we had and we believed that the information we had was sufficient and important enough that you should be informed of it right away.

THE COURT: I want to tell you something. If you fellows had put that in an affidavit and come up on a Rule 11, you would have gotten whacked. You didn't make any investigation at all to find out what you were talking about before you approached a judge who was handling a lawsuit?

MR. FLEMING: That's not true.

MR. CURNIN: This is the background in which this was going on, consider this: We knew –

THE COURT: Your client is upset because it says something about the Commission and the Commission says something about your client, but you are implicating me. That's where I come in.

MR. FLEMING: Judge, let me ask you a question. Would you have preferred that we not tell you?

THE COURT: I would have preferred that you called them on the telephone and said, look, we think there is something about the partiality or impartiality of the Judge. Let's talk to him. That's what I think Peter Fleming would have done if he were still in the U.S. Attorney's office.

MR. FLEMING: I would never have raised that question with Gary in a telephone call. What I should have done, as your Honor says, I should have called Gary on Saturday instead of Sunday. I will concede that. That was $250 million, part of it is going to be supplied –

THE COURT: What?

MR. CURNIN: There are two companies, Judge. Two companies are going to be put together as the result of an LBO. One of them is Palais Royal and the other is Three Bells Brothers 3.

THE COURT: That is the first I hear any numbers like that.

MR. CURNIN: Palais or its shareholders will receive approximately 100 million and Three Bells Brothers –

THE COURT: That's off, too. They would like to receive that kind of money.

MR. CURNIN: That is the information we have, Judge, and this is the information which we conveyed to you and which I conveyed to Gary and his people yesterday to the extent that I had this information yesterday.

Now –

THE COURT: Has anybody gone out to get the contract itself? Have you fellows got the contract?

MR. LYNCH: We have not had an opportunity to do that, your Honor.

THE COURT: Has anybody inquired into the status of the approaches to all of these companies that are supposed to be looking at this thing?

MR. LYNCH: We attempted to do that this morning,

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In re IVAN P. BOESKY SECURITIES LITIGATION,

MDL Dkt. No. 732
M21-45-MP

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,
v.

88 Civ. 6209 (MP)

DREXEL BURNHAM, LAMBERT INCORPORATED, et al.,
Defendants.

---

September 22, 1988
2:00 p.m.

(In open court)

THE COURT: In order to assist us in proceeding, I have drafted up some provisions for counsel to consider and we can address the proceedings through these provisions. It may save a lot of other conversation and I will ask the clerk to pass these out to counsel in the Securities & Exchange Commission case.

Take one and pass the rest. I assume you will take one for each firm. Don't accumulate them among the firms. Make sure they go to lawyers.

These suggestions are not intended to be all inclusive, but I thought that it would be well to address these suggestions at the outset and then hear anything further because if there is anything here that is non-controversial, we can dispose of that and go onto the things that counsel would like to talk about.

Mr. Curnin, do you want to address this for Drexel? I would appreciate it if you would do it from the lectern.

MR. CURNIN: Your Honor, we think that there is a preliminary matter which should be raised before we

discuss orders and discovery in this matter and co-counsel Peter Fleming representing Drexel would like to address that particular issue and then we can get into this other issue if need be.

THE COURT: Thank you.

Mr. Fleming.

MR. FLEMING: Yes, your Honor. There is a motion pending before your Honor returnable October 4. It is our position and Drexel's position and I believe the position of other defendants in the SEC case that your Honor should not rule on any matter in the SEC case until the determination of the motion presently returnable October 4.

THE COURT: Is that in the form of a motion?

MR. FLEMING: My request that you not rule until the determination of that motion is in the form of a motion, a your Honor.

THE COURT: Motion denied.

MR. FLEMING: With that, your Honor, Mr. Curnin will address the consolidation question.

MR. CURNIN: I am somewhat at a disadvantage, your Honor, in that we have just read this outline and, quite frankly, we have not had an opportunity to confer with co-counsel.

THE COURT: Take your time and I will give you that opportunity.

MR. CURNIN: At the outset, we think there are some provisions here which are acceptable to us and to the extent that they are not, I am sure I will hear about it immediately.

THE COURT: Take them down seriatim. No. 1.

MR. CURNIN: As far as I know, your Honor, we would not have an objection to item 1.

THE COURT: Does the commission have any objection to 1?

MR. NEWKIRK: No, your Honor.

THE COURT: Thank you.

MR. CURNIN: As to item 2, your Honor, it is not clear to me what is the intention of the court when you refer here to coordinated discovery? I have some idea I think of what the court has in mind, but it is not all that

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September 27, 1988

**In re Ivan F. Boesky Securities Litigation**
**MDL Dkt. No. 732 M21-45-MP**

TO LIAISON COUNSEL FOR PLAINTIFFS AND LIAISON COUNSEL FOR DEFENDANTS:

Enclosed are copies of a notice of motion, supporting affidavits and a memorandum of law in the action *Securities and Exchange Commission* v. *Drexel Burnham Lambert Incorporated et al.*, 88 Civ. 6209 MP.

These papers were filed today in the above-captioned action with a separate notice of motion and a request that they be placed under seal. We ask that you maintain the confidentiality of these papers until such time as the Court has ruled.

Very truly yours,

Thomas F. Curnin

cc: Hon. Milton Pollack
Clerk of Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

| | | |
|---|---|---|
| SECURITIES AND EXCHANGE COMMISSION, | : | |
| Plaintiff, | : | |
| v. | : | 88 Civ. 6209 (MP) |
| DREXEL BURNHAM LAMBERT INCORPORATED, | : | [Copy of Memorandum filed |
| DREXEL BURNHAM LAMBERT GROUP INCORPORATED, | : | under seal. This copy |
| MICHAEL R. MILKEN, LOWELL J. MILKEN, CARY J. | : | contains redactions and |
| MAULTASCH, PAMELA R. MONZERT, VICTOR POSNER, | : | pseudonyms; see footnote 1.] |
| STEVEN N. POSNER and PENNSYLVANIA | : | |
| ENGINEERING CORPORATION, | : | |
| Defendants. | : | |

## MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION SEEKING RECUSAL OF THE HON. MILTON POLLACK AND RANDOM REASSIGNMENT OF THIS CASE

Defendants Drexel Burnham Lambert Incorporated and Drexel Burnham Lambert Group Incorporated ("Drexel"), Michael R. Milken, Lowell J. Milken, Cary J. Maultasch and Pamela R. Monzert, respectfully submit this memorandum of law, together with the annexed affidavits of Frederick McCarthy and Frederick S. Moseley, IV, and counsel, both sworn to September 20, 1988, and supporting exhibits, in support of their motion seeking recusal of the Honorable Milton Pollack, pursuant to 28 U.S.C. § 455.

Recusal is required as (a family member) is likely to receive some $** as a part of a leveraged buy-out for which Drexel will raise approximately $** in mezzanine financing.[1] The inescapable conclusion is that this Court's "impartiality might reasonably be questioned" in these circumstances (§ 455(a)).

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1. The material in parentheses indicates pseudonyms utilized in place of names set forth in papers filed under seal. Double asterisks indicate redacted material.

There is clearly no choice or question that this motion is required and must be filed. It is imperative under any ethical standards that the facts underlying this motion be disclosed. Otherwise, a reasonable person would suspect a loss of judicial impartiality and would question whether parties were deliberately hiding facts in the hopes of currying favor with a trial judge who must administer and indeed decide a large part of this case without a jury.

**Preliminary Statement**

The SEC filed this civil enforcement action against Drexel and others on September 7. Because the SEC designated this case as "related" to certain private cases pending before the Honorable Milton Pollack, the Clerk immediately assigned the case to Judge Pollack.

We respectfully submit that the established standards for judicial disqualification require Judge Pollack to recuse himself immediately from further participation in this action. As the McCarthy/Moseley affidavit explains (the family member), owns or controls through family trusts over ** of the stock of (Company A), a family-owned corporation that owns and operates ** in **.[2] (The family member) and ** family trusts stand to receive about $** in cash by virtue of a pending leveraged buy-out transaction. The transaction is to be financed, in significant part, by Drexel through its High Yield Bond Department, of which the individual Drexel defendants are all members. As the proposed transaction has been structured, Drexel will also be one of the buyers of the equity in the enterprise being sold by (the family member). Under these circumstances, the appearance of conflict is inescapable.

---

2. **

**Facts**

The relevant facts, set forth more fully in the annexed joint affidavit of Messrs. McCarthy and Moseley, are as follows:

In or about **, (Company A) became and continues to be the subject of a pending leveraged buy-out transaction ("the

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

| | | |
|---|---|---|
| SECURITIES AND EXCHANGE COMMISSION, Plaintiff, | : | |
| v. | : | |
| DREXEL BURNHAM LAMBERT INCORPORATED, DREXEL BURNHAM LAMBERT GROUP INCORPORATED, MICHAEL R. MILKEN, LOWELL J. MILKEN, CARY J. MAULTASCH, PAMELA R. MONZERT, VICTOR POSNER, STEVEN N. POSNER, and PENNSYLVANIA ENGINEERING CORPORATION, | : | 88 Civ. 6209 (MP) |
| Defendants. | : | |

STATE OF NEW YORK )
: ss.:
COUNTY OF NEW YORK )

ARTHUR L. LIMAN, being duly sworn deposes and says:

1. At the time we filed the recusal motion on September 20, 1988, I was unaware that our firm had undertaken any services for George and Phyllis Asch, or for Palais Royal. I was first advised by my partner, Alfred Youngwood, that he had done some tax, family and estate work for the Aschs on or about September 26. Mr. Youngwood told Mr. Flumenbaum on the evening of September 23, saying that he was mentioning the representation because of its possible impact on the question of Judge Pollack's recusal.

?????? course of the representation of the Aschs until we received a copy of Judge Pollack's order to show cause. The only disclosure of client confidences was by the Court in the order to show cause, not by us. The recusal motion was based on indisputable facts provided by Drexel, namely, that Drexel is arranging the mezzanine financing for a leveraged buyout that will result in

the payment to Mrs. Pollack of approximately $30 million for her interest in Palais Royal.

4. We know of no fiduciary duty between our firm and Palais Royal or its shareholders which is in any conceivable way involved in the Court's order to show cause. Neither Palais Royal nor its shareholders have an interest in who presides in the SEC case. Moreover, I know of no fiduciary duty to any client that would require a lawyer to refrain from making a recusal motion where warranted. Indeed, if a lawyer has a representation that requires disqualification of a Judge, he has not only a right but a transcendent duty to advise the Court and to request recusal. We have done that. If, for reasons that are not discernible to us, Palais Royal or its shareholders can be adversely affected by the recusal motion, as Judge Pollack's sua sponte order to show cause suggests, then that is all the more reason why he must recuse himself.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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| | | |
|---|---|---|
| In re DREXEL BURNHAM LAMBERT INCORPORATED, DREXEL BURNHAM LAMBERT GROUP INCORPORATED, MICHAEL R. MILKEN, LOWELL J. MILKEN, CARY J. MAULTASCH, and PAMELA R. MONZERT, Petitioners. | ) | No. 88-3060 |

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## REPLY OF SECURITIES AND EXCHANGE COMMISSION TO OPPOSITION TO JOINT MOTION TO MODIFY THIS COURT'S STAY

The Commission submits this Reply to respond to certain statements in the Opposition filed by defendants Michael R. Milken, Lowell J. Milken and Pamela R. Monzert ("Milken defendants"). As demonstrated in their Opposition, the Milken defendants do not object to the joint motion of the Commission and the settling defendants that this Court modify its stay of district court proceedings to permit consent judgments to be entered and administered. Their objection is to Judge Pollack.

There are compelling reasons that the settlement should be presented to Judge Pollack. As this Court noted in its decision denying mandamus, Judge Pollack has presided over substantial pretrial activity in certain civil securities fraud actions naming Drexel as a defendant, consolidated in 1987 as *In re Ivan F. Boesky Securities Litigation*. The settlement with Drexel provides for a $350 million civil disgorgement fund to compensate persons with valid claims against Drexel arising out of certain defined activities under the securities laws. Since many of the claimants to the $350 million fund under the settlement are likely to include plaintiffs in the private civil actions, Judge Pollack is the

most appropriate Judge to administer the consent decrees. Defendants' attempt to obtain another judge to enter and administer the settlement would circumvent this Court's decision that Judge Pollack was not required to recuse himself.

For the reasons stated, the Commission urges this Court to modify the stay to permit entry and administration of the consent decrees against these settling defendants — a result to which all parties agree — and to remand to Judge Pollack for this purpose.

Respectfully submitted,

Paul Gonson
Jacob H. Stillman
Rosalind C. Cohen
Leslie E. Smith

SECURITIES AND EXCHANGE COMMISSION
450 5th Street, N.W.
Washington, D.C. 20549
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Dated: April 17, 1989

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(212) 373-3191 May 1, 1989

Patricia D. Gugin, Esq.
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**Milken, et al. v. SEC**

Dear Ms. Gugin:

I am in receipt of your letter dated April 27, 1989 to Mr. Arthur Liman.

Please be advised that we do not consent to plaintiffs in the *Boesky Securities Litigation* filing an *amicus curiae* brief in the Supreme Court in the above captioned matter.

Sincerely,

Martin Flumenbaum

Via Telecopy

Supreme Court, U.S.
FILED
MAY 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1628

IN THE
**SUPREME COURT OF THE UNITED STATES**
OCTOBER TERM, 1988

MICHAEL R. MILKEN, LOWELL J. MILKEN, AND PAMELA R. MONZERT,

*Petitioners,*

v.

SECURITIES AND EXCHANGE COMMISSION,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRUIT

# PETITIONERS' REPLY BRIEF

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## Preliminary Statement

Understandably, the Government does not defend the court of appeals as *correct* in refusing to disqualify a district judge whose wife received $30 million in a transaction financed by a party before him. Rather, calling the petition "fact-specific" (Opp. Br. at 15), the Government rewrites the opinion below in an effort to harmonize the Second Circuit's avowedly "purely legalistic" (A14) approach to judicial disqualification with the rigorous demands of section 455(a) and of *Liljeberg* v. *Health Services Acquisition Corp.*, 108 S. Ct. 2194 (1988). In endorsing the Second Circuit's unprecedented "clear and indisputable abuse of discretion" standard for pretrial review of denials of recusal motions, the Government ignores the threat this insurmountable standard poses to public confidence in the integrity of the judiciary, and glosses over an obvious conflict among the circuits on this precise issue.

The Second Circuit's errors extend well beyond the facts of this case. As demonstrated by the heated tone of the Second Circuit's internal debate, principles — not facts — are at stake in this petition. The four Second Circuit judges who took the unusual step of writing a dissent from the court's denial of rehearing *en banc* expressly disagreed with the panel majority's "standards for recusal" (A42), not with its factual findings, which are essentially undisputed. If not corrected, the general principles applied by the court below, in direct conflict with other circuits, will set a mischievous precedent and will undermine Congress's central objective in enacting section 455(a): to promote public confidence in the integrity of the judiciary.

The Second Circuit's distorted perspective on judicial disqualification is especially ironic in this case. As Judge Lumbard noted below, issues of judicial integrity — always of paramount importance — assume even greater significance when the integrity of financial markets is the very subject being adjudicated. (A30). The Government's constant refrain in enforcing the securities laws has been that the same legal principles apply to everyone. This rule applies to courts every bit as much as stock markets. The SEC brings enforcement actions like this one with the announced goal of preserving public confidence in the securities markets and in those who participate in them. That endeavor, whatever its merits in other respects, can only backfire if the

public cannot be confident that the judicial process responsible for policing the markets is itself insulated from all temptations to manipulate, evade, or ignore the rules.

If the federal district judges, when their jurisdiction is invoked by the SEC, are to be the guardians of propriety in the marketplace, then it is incumbent upon the appellate courts to keep an especially close watch on the guardians themselves. Contrary to the implications of the decision below, there is no separate, "purely legalistic" standard for the more privileged or the more financially and legally sophisticated, for whom conflicts of interest or other improprieties obvious to any reasonable observer may be brushed aside as imaginary or inconsequential.

In the public eye, Judge Pollack can hardly appear an appropriate jurist to preside over allegations of wrongdoing in the high-yield bond market — in a case on which the entire nation has focused its attention — when his wife has just received $30 million from a deal financed by such bonds, underwritten and largely purchased by Drexel (one of the parties before him), and when the judge himself has made the extraordinary public statement that his family's fortunes were "adverse[ly]" affected by the very filing of this recusal motion. (A27). This appearance of impropriety is made all the more disturbing, not any less so, by the fact that the SEC has convinced Drexel, whose business dealings benefited the judge's family and whose interests are now at least partly adverse to petitioners', to do an abrupt about-face: in a provision surely unique in the history of governmental consent decrees, Drexel has agreed with the SEC "not to petition the Supreme Court of the United States for a writ of certiorari, or to seek to join further in the motions of others requesting the recusal of the Honorable Milton Pollack in this and all related actions." (Opp. Br. of the *Arden Way* Plaintiffs as Amici Curiae, App. at 3).

Moreover, Judge Pollack's intense personal reaction to the filing of the recusal motion — which the Government altogether ignores — makes this case especially appropriate for plenary review. If Congress's recusal procedures are to be effective, litigants must not be afraid to bring judicial conflicts of interest and other grounds for recusal to light whenever discovered. Nor may judges view litigants who seek recusal as "attacking [them] professionally" (A76) or launch

retaliatory counterattacks on the ethics of attorneys who file such motions. If that conduct is countenanced here, no lawyer contemplating a recusal motion — a step taken only with great circumspection — will be able to justify the risks to his client and his own professional reputation. This systemic impact on the bar as well as the judiciary should be given great weight in assessing the petition in this case.

Most denials of certiorari represent the end of the matter. This case, however, has barely begun. If certiorari is denied, this case will proceed for what is likely to be years under a cloud — a cloud which, as noted by the five dissenting Second Circuit judges, would not be dissipated, if ever, until the final appeal in this litigation. In light of the nationwide attention focused on this case and the intense split among the Second Circuit judges themselves, this Court's failure to grant certiorari would send a loud and lamentable signal to the lower federal courts and to the public at large.

## Argument

### I. CERTIORARI IS APPROPRIATE TO REVIEW THE SECOND CIRCUIT'S DANGEROUS AND UNPRECEDENTED STANDARDS FOR JUDICIAL DISQUALIFICATION UNDER SECTION 455(a).

The Government attempts to contain the broad implications of the opinion below by creatively rewriting it. To be sure, as noted in our petition, the Second Circuit did pay lip service to the objective recusal standard set forth in section 455(a) and embraced by this Court in *Liljeberg*. But the standard actually applied by the Second Circuit — which is what will guide courts considering future recusal motions — is profoundly at odds with the letter and spirit of the disqualification statute, with the *Liljeberg* decision, and with the decisions of other circuits.

A. Contrary to the Government's assertion (Opp. Br. at 16 & n.16), the court of appeals, as noted by the five dissenting judges, unambiguously adopted a "purely legalistic perspective" in evaluating appearances of judicial partiality under section 455(a). (A14). The Second Circuit's deeply flawed approach is evident not only from its express

rejection of Judge Lumbard's statement in dissent that section 455(a) "requires us to judge the situation from the viewpoint of the reasonable person, and not from a purely legalistic perspective" (A14, A28), but also from the majority opinion's prolonged and detailed analysis of the various lines of privity in the Palais Royal transaction and from its reliance on "expert testimony" as to whether Drexel was "indispensable" to the successful financing of the leveraged buyout. (A6, A7).

But why should these matters make the slightest difference? Why would the reasonable observer, evaluating an appearance of judicial partiality, care whether a party literally handed $30 million to a judge's wife, or whether such a payment instead flowed to the judge's wife through other hands, as a direct result of the party's efforts? Why would an objective observer care whether some other investment bank not appearing before the judge might in theory have appeared on the scene to raise the millions paid to the judge's wife? The short answer is that such matters would be wholly irrelevant to the reasonable bystander.

Thus, the Second Circuit's adoption of a "purely legalistic perspective" cannot be seen as a mere slip of the judicial pen: this perspective permeates the court's whole approach, directly conflicts with *Liljeberg* and the decisions of other circuits, and guts the congressional policies animating section 455(a).

B. Moreover, contrary to the Government's intimations, petitioners have never suggested that appearances of partiality are to be measured by "an ill-informed lay person [who] might suspect the worst of a judge." (Opp. Br. at 16). To the contrary, petitioners urge that the legalistic distinctions at the core of the court of appeals' analysis would be demonstrably irrelevant to a reasonable lay observer assessing an appearance of partiality, however well-informed or sophisticated the observer might be. 1/

---

1/ As this Court made clear in *Liljeberg*, the lay observer contemplated by section 455(a), even if he would not "suspect the worst of a judge," does have "the concerns of the skeptic." 108 S. Ct. at 2205 n.12; *see id.* at 2204–05. But one need not be much of a skeptic to see through the smokescreen of "privity" created by the court below.

In short, disqualification under section 455(a) turns on relevant appearances, not privity. 2/ Judges struggling with recusal motions should not be tempted to gloss over apparent conflicts of interest through the kind of casuistic reasoning that infects the decision below.

C. As an additional ground for certiorari, petitioners demonstrated that the court of appeals improperly relied on extraneous factors hostile to the purposes of section 455(a) — including (1) the district judge's purported investment of time in the case; (2) concededly unsubstantiated charges that a party intentionally manufactured the conflict; and (3) admittedly unsupported allegations of judge-shopping. The Government meekly defends the court's reliance on these irrelevant matters as "fill[ing] in the background that the statutorily required objective observer would take into account in judging recusal." (Opp. Br. at 17). The Government (*id.* at 17–18) asks this Court to credit the court of appeals' transparent rhetorical ploy of discussing these irrelevant but tendentious matters at length, admitting that they are unproved, and claiming that a reasonable person would "want to know" about them anyway — all the while insisting, with an almost perceptible wink, that the court's decision does not "turn on" them. (A20, A18).

But the Government cannot so easily patch up the Second Circuit's defective analysis. Section 455(a)'s reasonable lay observer should, of course, be "fully informed of the facts *underlying the grounds on which recusal was sought.*" *Parker* v. *Connors Steel Co.*, 855 F.2d 1510, 1524 (11th Cir. 1988) (emphasis added); *see also Union Carbide Corp.* v. *U.S. Cutting Services*, 782 F.2d 710, 715 (7th Cir. 1986). But no court has ever suggested that the statutorily mandated observer should consider the charges of judge-shopping that inevitably follow the filing of a recusal motion or that the lay observer should weigh whether holding the judge to the statutorily mandated recusal standard would result in a significant waste of previously expended judicial time and

2/ For example, in some cases a judge may not need to recuse himself even though he is in privity with a party, as when a judge is a ratepayer of a utility involved in proceedings before him. *See, e.g., In re New Mexico Natural Gas Antitrust Litigation*, 620 F.2d 794 (10th Cir. 1980).

effort. Congress has already struck that balance — and did so in favor of an unimpeachable judiciary.

## II. THE SECOND CIRCUIT'S INSURMOUNTABLE STANDARD FOR MANDAMUS REVIEW OF RECUSAL MOTIONS MERITS PLENARY REVIEW BY THIS COURT.

A. The Government is understandably apprehensive about subjecting to plenary consideration the Second Circuit's illogical standard of mandamus review for recusal motions. But one cannot seriously credit the Government's suggestions that the standard of mandamus review "made [no] difference to the court of appeals' decision in this case," makes no "difference to the outcome of disqualification cases in general," and is simply too "abstract" to warrant this Court's certiorari review. (Opp. Br. at 20).

First of all, the Second Circuit did *not* apply, as the Government incorrectly contends (Opp. Br. at 20–25), a "clear and indisputable right" standard for mandamus review. Rather, the majority applied a "clear and indisputable abuse of discretion" standard. (A12, A15). That unduly stringent standard *has never before been applied by any federal court* and, not surprisingly, is not mentioned anywhere in the Government's opposition brief. If left uncorrected, the Second Circuit's standard would effectively eliminate pretrial review of a district judge's denial of a recusal motion.

Contrary to the Government's misleading assertion (Opp. Br. at 20), the majority's essentially insurmountable standard of review was dispositive in the Second Circuit's denial of relief. [3/] As the Government grudgingly acknowledges (*id.* at 20 n.20), eight Second Circuit judges confirmed that it was the majority's stringent standard of review that led the court below to deny relief, and expressly said that the result might well have been different if the matter were being considered on direct appeal under an ordinary standard of

3/ The majority opinion expressly declared that "[a]n appellate court's power to issue a writ of mandamus upon a claim of wrongful refusal to recuse is inextricably related to the scope of review over the district court's determination." (A10)

review. (A37, A42). [4/] The standard of mandamus review applied by the majority was anything but irrelevant; it was, in fact, outcome-determinative. [5/]

B. The Government attempts to justify the Second Circuit's standard of mandamus review by invoking the general "congressional policy disfavoring interlocutory appeals" (Opp. Br. at 21) and by embracing the majority's wholly speculative fear that applying a mandamus standard less stringent than "clear and indisputable abuse of discretion" would transform "mandamus applications to review a judge's refusal to recuse [into] an effective tactic for harassment and delay." (A11). These purported justifications wholly ignore the unique institutional values implicated by recusal motions.

*First*, as *Liljeberg* emphasized, Congress's paramount concern in enacting section 455(a) was "to promote public confidence in the integrity of the judicial process." 108 S. Ct. at 2202. That policy greatly outweighs the interest in avoiding piecemeal litigation asserted by the Government. Indeed, this Court has held that the policy against piecemeal review, while no doubt substantial, must yield in "an extraordinary situation." *Kerr* v. *United States Dist. Court*, 426 U.S. 394, 403 (1976). When the *Liljeberg* Court was confronted with an equally substantial interest -- preserving the finality of judgments (which, too, may be overcome only in "extraordinary circumstances," 108 S. Ct. at 2204) -- it emphatically held that the systemic imperative of maintaining the public's confidence in the judicial process constitutes an "extraordinary circumstance" sufficient to overcome the policy in

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4/ The same reasoning punctures the Government's claim that "it is hardly clear to what extent the special 'clear and indisputable right' standard for mandamus relief actually makes a difference to the outcome of disqualification cases in general." (Opp. Br. at 20).

5/ Nor should this Court credit the Government's fanciful assertion that determining the proper mandamus standard "has an abstract quality that counsels against this Court's review." (Opp. Br. at 20). Standards of review, while perhaps "abstract" to the Government, are of unquestionable importance in securing substantive rights and are frequently dispositive. Each Term, this Court's docket contains numerous cases involving equally "abstract" standard-of-review issues.

favor of preserving the finality of judgments. *Id.* [6]/ That same conclusion in favor of preserving judicial integrity necessarily follows here.

*Second*, the Second Circuit's speculative fear that a less stringent standard of mandamus review would open the floodgates to a multitude of frivolous recusal motions and mandamus petitions is baseless. [7]/ Given the sensitivity of disqualification issues, lawyers approach the filing of serious recusal motions — much less "spurious" ones (Opp. Br. at 24) — most reluctantly. Those few lawyers contemplating frivolous recusal motions, undeterred by the potential damage to their professional reputations, would find their boldness curbed by the specter of sanctions at the trial or appellate court level. [8]/ Finally, the fact that only two mandamus petitions seeking to reverse a district judge's denial of a recusal motion were filed in the Seventh Circuit in the four years since that court adopted a far less stringent standard of mandamus review completely disposes of the Second Circuit's unfounded concerns. *See In re National Union Fire Ins. Co.*, 839 F.2d 1226 (7th Cir. 1988); *Union Carbide Corp.* v. *U.S. Cutting Services*, 782 F.2d 710 (7th Cir. 1986).

At bottom, the Government rests its argument in support of an artificially stringent mandamus standard on Congress's failure "to create a special category of interlocutory appellate review for recusal cases." (Opp. Br. at 24). But in the absence of an express congressional directive, this Court has long viewed the scope of interlocutory appel-

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6/ The dictum plucked from *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 378 (1981), a pre-*Liljeberg* decision involving appealability under 28 U.S.C. § 1291, cannot bear the weight placed upon it by the Government. (Opp. Br. at 23). Indeed, in *Firestone*, this Court expressly recognized the availability of mandamus relief to review interlocutory orders. *See* 449 U.S. at 378–79 n.13. Moreover, *Firestone* involved the issue of attorney disqualification, not judicial disqualification. Notwithstanding the Government's assurance to the contrary, judicial disqualification motions, which are essential to the public's confidence in the integrity of the judiciary, are strikingly different "from numerous other motions routinely made during and before trial." (Opp. Br. at 23). *Cf. Helstoski* v. *Meanor*, 442 U.S. 500, 506 (1979) (creating an exception to the final judgment rule for an order implicating interests that "are vitally important to our system of government").

7/ In addition, the Second Circuit's fear that a less stringent standard would result in "delay" (A11) is of limited concern: Unless an appellate court grants the mandamus petitioner a stay, district court proceedings would continue unimpeded.

8/ *See, e.g., DeLuca* v. *Long Island Lighting Co.*, 862 F.2d 427 (2d Cir. 1988) (imposing sanctions against an attorney for a frivolous appeal of a denial of a recusal motion).

late review and mandamus relief -- subjects about which Congress has spoken only in the most general terms -- as within the courts' traditional sphere of competence. 9/

C. The Government struggles without success to obscure the direct conflict between the insurmountable standard of mandamus review adopted by the Second Circuit and the far more sensible standard applied by the Fourth, Fifth and Seventh Circuits. According to the Government, the standard for mandamus review in the Seventh Circuit "simply has not been settled," and that Circuit has not adopted a special rule for recusal matters. (Opp. Br. at 25). The Government is wrong. Judge Posner's unambiguous pronouncement in *Union Carbide Corp.* v. *U.S. Cutting Services*, 782 F.2d 710, 712-13 (7th Cir. 1986), never addressed in the Government's brief, speaks for itself:

> A judge's refusal to recuse himself in the face of a substantial challenge . . . should be dispelled at the earliest possible opportunity by an authoritative judgment either upholding or rejecting the challenge. . . . [W]here a serious [recusal] question is raised, we shall interpret generously our power to issue the writ [of mandamus], in order that we may lay the question to rest at the earliest possible time.

*See also Durhan* v. *Neopolitan*, No. 88-2108, slip op. at 12 (7th Cir. April 20, 1989) ("Once a judge whose impartiality toward a particular case may reasonably be questioned presides over that case, the damage to the integrity of the system is done.") (citing *Union Carbide*, *supra*).

The Government similarly errs when it states that the Fourth and Fifth Circuits have not "enunciate[d] any contrary standard for mandamus review." (Opp. Br. at 25). Although those courts did not discuss their standard for mandamus review at length, the inquiry undertaken

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9/ *See, e.g., Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.*, 460 U.S. 1 (1983); *Helstoski* v. *Meanor*, 442 U.S. 500 (1979); *Abney* v. *United States*, 431 U.S. 651 (1977); *United States* v. *Nixon*, 418 U.S. 683 (1974); *Idlewild Liquor Corp.* v. *Epstein*, 370 U.S. 713 (1962); *Stack* v. *Boyle*, 342 U.S. 1 (1951); *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541 (1949).

by those courts is simply whether the district judge's failure to recuse himself was "erroneous." *See In re Rodgers*, 537 F.2d 1196, 1197 (4th Cir. 1976); *In re Faulkner*, 856 F.2d 716, 720 (5th Cir. 1988).

D. Finally, it is disingenuous for the Government to chide petitioners for "offer[ing] no good reason for departing from the ordinary mandamus standard for judicial disqualification cases." (Opp. Br. at 22). In fact, the petition delineated *five* compelling reasons (Pet. at 17–18), which the Government essentially ignores. All the Government can muster in response is the lame generalization that delaying resolution of a recusal motion is no more harmful *to the parties* than delaying review of any other interlocutory order whose error may ultimately require reversal on appeal. (Opp. Br. at 23). What the Government and the Second Circuit entirely fail to appreciate is that, in contrast to other interlocutory matters, "if a judge proceeds in a case where there is (only) an appearance of impropriety in his doing so, the injury is *to the judicial system as a whole* and *not* to the substantial rights of the parties." *United States* v. *Balistrieri*, 779 F.2d 1191, 1204 (7th Cir. 1985) (emphasis added), *cert. denied*, 475 U.S. 1095 (1986); *see also Union Carbide*, 782 F.2d at 712; *United States* v. *Murphy*, 768 F.2d 1518, 1539 (7th Cir. 1985). As emphasized in *Liljeberg*, it is precisely that injury that section 455(a) was enacted to avert, and it is precisely that injury that the Second Circuit's anomalous and unduly stringent mandamus standard virtually guarantees.

## Conclusion

In a time of deepening public skepticism toward virtually all other institutions of govenment, it is hard to imagine a more pressing imperative than preserving both the fact and the appearance of judicial integrity. Far from posing "fact-specific" issues that "do[] not call for this Court's review" (Opp. Br. at 15), the decision below directly assaults the principles safeguarding that integrity. That decision could not be left standing by this Court without serious systemic consequences. Therefore, certiorari should be granted.

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Respectfully submitted,

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